Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

HANS HOECK,

Petitioner,

v.

CITY OF PORTLAND,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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99 pp

QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of whether government may demolish a privately-owned building pursuant to its police power without tendering just compensation to the building's owner, when that building is neither a health nor safety hazard, but merely is unoccupied and aesthetically unattractive. This question arises in almost every city and county in the nation.

Petitioner Hans Hoeck - owner and renovator of the Bridgeport Hotel until the City of Portland demolished it - brought this action against the City of Portland, contending the city's demolition of his building violated the Fourteenth Amendment to the U.S. Constitution and the Takings Clause of Article I, section 18 of the Oregon Constitution by arbitrarily and unreasonably demolishing his building, taking his private property without just compensation. Mr. Hoeck had purchased the building, secured a city permit to renovate the structure as an office building, and had obtained financing for the project. After he had spent over a million dollars on the project, the city withdrew his permit; he thereafter lost financing, leaving the renovation uncompleted and the building unoccupied. The city thereafter demolished the building. Disregarding Mr. Hoeck's argument that demolition constitutionally could not take place without the City first finding the building to be a private nuisance by being a health or safety hazard, the United States Court of Appeals for the Ninth Circuit affirmed the decision of United States District Court for the District of Oregon, granting the City's Motion for Summary Judgment on all of Mr. Hoeck's claims. The Ninth Circuit denied Mr. Hoeck's Petition for Reconsideration and Suggestion for Rehearing En Banc.

QUESTIONS PRESENTED FOR REVIEW - Continued

The Ninth Circuit held the city's demolition of the building was neither arbitrary nor unreasonable, and was neither a violation of Mr. Hoeck's substantive due process rights under the Fourteenth Amendment, nor an unconstitutional regulatory taking under the Oregon Constitution's Takings Clause. The Court concluded that the city's demolition was not a permanent physical invasion of Mr. Hoeck's ownership interest in the property; it also determined that the city's demolition did not deprive Mr. Hoeck of all economically beneficial use of his property. The questions presented are:

1. Whether government can, under its exercise of the "police power," demolish an unoccupied building that is not a health or safety hazard, but is merely unsightly or unoccupied?

2. Whether a declaration by government that a structure is a public nuisance, without a demonstration that the structure is a private nuisance, is sufficient to relieve government of its obligation to pay just compensation for the demolition of the structure?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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DECISIONS BELOW

The Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 57 F.3rd 781 (1995), and is reproduced as Appendix (App.) A. The Order of the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for a rehearing en banc is reproduced as Appendix B. The opinion of the United States District Court for the District of Oregon granting the city's Motion for Summary Judgment is unreported, and the court's slip opinion is reproduced as Appendix C. The Judgment of the District Court dismissing the complaint of Mr. Hoeck is

reproduced as Appendix D. The Writ of Review Proceedings of the Circuit Court of the State of Oregon for the County of Multnomah on October 26, 1990 and July 17, 1992 are reproduced at Appendix E. The orders of the City of Portland's Code Hearings Officer (CHO), dated June 2, 1989, November 24, 1989, March 1, 1990, and October 4, 1991 are reproduced at Appendix F. Page references are to the version in the appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, review of which is sought on petition, was entered on June 12, 1995, and amended on July 10, 1995. The Order of the Ninth Circuit denying reconsideration and rejecting the suggestion for rehearing en banc was entered on August 15, 1995. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The ordinances at issue are the Portland City Code, Chapters 22.04, 22.05 and 24.15, relevant portions of which are set out at Appendix G.

Page references are to the versions in the appendix.

STATEMENT OF THE CASE

A. Statement of Facts

This is an inverse condemnation action. Mr. Hoeck contends that the City of Portland (city), relying on provisions of the Portland City Code (PCC) governing the demolition of "abandoned buildings," by demolishing his unoccupied and partly renovated building, the Bridgeport Hotel, took his private property for public use without payment of just compensation.

During 1984 and 1985, Mr. Hoeck made plans to gut the existing structure of the 6-story Bridgeport Hotel, to convert its use to an office building, and then to renovate and rebuild the structure, including the addition of 4 new, additional stories. The city issued him a conditional use permit to proceed. Thereafter, on May 9, 1985, Mr. Hoeck received a commitment for over six million dollars of permanent financing to accomplish the renovation from State Federal Savings and Loan. On May 15, 1985, the city issued Mr. Hoeck a building permit to rebuild the structure as a 10-story building.

Commencing on May 16, 1985, Mr. Hoeck began work on the renovation and rebuilding of the building,

expending over a million dollars on the project by July 22, 1985. On that date the city issued him an order to stop work, pending further review of the conditional use permit and building permit by the city. By the time the city completed that review on February 3, 1986, State Federal was declared insolvent and its operations were assumed by the Federal Savings and Loan Insurance Corporation (F.S. L.I.C.).[1] On March 6, 1986, the F.S.L.I.C. disavowed the permanent financing commitment to Mr. Hoeck. Thereafter, until the commencement of actual demolition of the building, Mr. Hoeck diligently, albeit unsuccessfully, sought a replacement financing commitment.

On March 29, 1989, the city wrote to Mr. Hoeck directing him to "secure the building adequately against entry by transients" and to either "begin completion or demolition of the structure." The city instructed Mr. Hoeck to appear before its Code Enforcement Hearings Officer so the hearings officer could determine whether the building "is an abandoned or dangerous structure which constitutes a nuisance or hazard to the public."

Hearings were held before the hearings officer on June 1, 1989, October 4, 1989, November 15, 1989, March 1, 1990, and October 4, 1991. "By the time the last hearing was held on October 4, 1991, the Bridgeport was no longer classified as a 'dangerous' building. It had been secured with steel shutters, was structurally sound, and not in danger of

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[1]The Federal Deposit Insurance Corporation (F.D.I.C.) later assumed the operations of State Federal, supplanting the F.S.L.I.C..

collapse." App. A- 7.[2] However, pursuant to the PCC, a structure may be ordered demolished if it "has been vacant for a period of in excess of six months." App. G-1 , G-5. "[T]he CHO ordered the Bridgeport demolished on the grounds that it was an 'abandoned' structure...." App. A-7. The hearings officer concluded the building should be destroyed because "in its current partially complete and gutted condition, [it] remains a visual blight upon the surrounding neighborhood." App. F- 17.

Twice Mr. Hoeck sought judicial review of the orders of the hearings officer by filing in the Circuit Court for Multnomah County petitions for writs of review. Both efforts were unsuccessful. App. E-1, E-3. After the second, unsuccessful writ proceeding, the city, on July 27, 1992, "began demolition and completely removed the structure from the property." App. A-7.

When Mr. Hoeck challenged the city's demolition by filing a complaint in the United States District Court for the District of Oregon, the Court rejected the pendent state claim

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[2]This finding was reiterated by Circuit Court Judge Roth in a separate writ of review proceeding challenging the decision of Multnomah County to reduce the period during which delinquent taxes on the building could be redeemed. After losing permanent financing, Mr. Hoeck had allowed the property taxes on the subject property to fall delinquent. The county, having determined that the city had declared the building to be an "abandoned" structure, declared that the redemption period for payment of delinquent taxes could be reduced from the statutory minimum of two years to thirty days. That decision, made pursuant to Multnomah County Ordinance 630, required an independent determination that the structure either was a public nuisance or public safety hazard or was causing a substantial depreciation in property values. Judge Roth also concluded the building was no public safety hazard.

that the city's decision violated the Takings Clause of the Oregon Constitution by taking his property without just compensation. Circuit Judge Belloni, granting the city's motion for summary judgment, held that "the destruction of the building did not deprive plaintiff of all economically beneficial use of his property. Plaintiff remains the owner of the land on which the building was situated and remains free to develop it." App. C-15 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 2901 (1992)). Moreover, the Court found that "Plaintiff has suffered no permanent invasion of his ownership interest in the property." App. C-11.

The court of appeals affirmed the decision of the district court. Circuit Judge Fletcher, writing for the three-judge panel, held that the City's "regulation has not interfered with Hoeck's reasonable, investment-backed expectations. Under the law at the time Hoeck took title, he had no right to use his property to maintain an abandoned structure." App. A-20 (citing *Lucas*, 112 S.Ct. at 2895). The court of appeals observed that, under *Dodd v. Hood River County*, 836 P.2d 608, 616 (Or. 1993), "reasonable 'investment-backed expectations must take into account the law [at the time the property is purchased], as well as the government's power to change the law.'" App. A-19. The court of appeals ended its opinion by summarily rejecting Mr. Hoeck's complaint: "We conclude that Hoeck's claim for a regulatory taking under Oregon law is without merit."[3] App. A-20.

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[3] Although Mr. Hoeck's takings claim was a pendent state claim, the final disposition of that claim was made under Federal takings jurisprudence. The court of appeals found that "while Oregon law ultimately controls, we rely to some extent on federal takings law to resolve Hoeck's state inverse condemnation claim."

B. Proceedings Below

This action was originally commenced when the city issued a complaint for a city code violation regarding the Bridgeport Hotel on May 12, 1989, notifying Mr. Hoeck to appear before its Code Hearings Officer[4]. After a series of five hearings between June, 1989, and March, 1990, from which the three orders at App. F issued, the hearings officer ordered Mr. Hoeck to demolish the structure as an abandoned building.[5] On May 15, 1990, Mr. Hoeck sought judicial review of that order by filing a Petition for Writ of Review in the Circuit Court of the State of Oregon for Multnomah

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App. A-16. Mr. Hoeck, in his appeal to the court of appeals, based his legal argument on the assertion that state law decisions had to be applied consistent with this Court's decisions construing the Fifth Amendment in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992). Plaintiff-Appellant's Reply Brief at 6, 8-9, 11, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995) (importance of *Lorretto* and *Yee* is that physical invasions by government require compensation per se; demolition for aesthetic rather than safety purposes requires compensation under *Nollan*).

[4] The complaint alleged that Mr. Hoeck's building, the Bridgeport Hotel, had been vacant for more than six months, that it was open to entry by vagrants and transients, and that various aspects of the structure were in disrepair.

[5] An additional hearing was held before the hearings officer on October 4, 1991 to afford the representative of the FDIC, the receiver of the bankrupt savings and loan that had provided the initial financing of the project, an opportunity to contest the demolition order. The hearings officer rejected the FDIC's argument.

County.[6] The circuit court, on October 26, 1990, denied the writ. On December 3, 1991, Mr. Hoeck again sought judicial review of the hearings officer's order by filing a Petition for Writ of Review in the Circuit Court of the State of Oregon for Multnomah County. The circuit court, on July 17, 1992, also denied that writ. Thereafter, the city, beginning on July 27, 1992, demolished the Bridgeport Hotel.

On January 26, 1993, Mr. Hoeck filed, in the United States District Court for the District of Oregon, a civil complaint alleging deprivation of civil rights under 42 U.S.C. § 1983, seeking a declaratory judgment under 28 U.S.C. § 2201, and alleging a pendent claim of inverse condemnation under Article I, section 18 of the Oregon Constitution brought pursuant to 28 U.S.C. § 1367. On cross motions for summary judgment the District Court denied Mr. Hoeck's motion, and granted summary judgment in favor of the city, entering its judgment on July 19, 1993. From that judgment, an appeal was timely filed in the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit, issued its order and opinion affirming the decision of the District Court on June 12, 1995. Thereafter, *sua sponte*, the Ninth Circuit, on July 10, 1995, issued its order and amended opinion affirming the District Court. On July 13, 1995, Mr. Hoeck filed with the Ninth Circuit a Petition for Rehearing with Suggestion for Rehearing En Banc. The Ninth Circuit, on August 15, 1995, denied the petition and rejected the suggestion for rehearing en banc.

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[6] Quasi-judicial decisions of inferior tribunals may be reviewed on the record by the circuit courts in writ of review proceedings brought pursuant to ORS 34.010 - 34.100 .

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a Federal Court of Appeals. Under Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All four of these grounds for review are present in this case.

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT - CAN GOVERNMENTS, UNDER THE GUISE OF THEIR POLICE POWER, DEMOLISH, WITHOUT JUST COMPENSATION, "ABANDONED" BUILDINGS THAT ARE NOT SAFETY HAZARDS BUT MERELY UNSIGHTLY ?

The precedent established by the decision below places the owners of commercial and residential structures at the mercy of the local government officials who decide that certain structures, because they are unattractive or have no tenants, should be destroyed. Mr. Hoeck, having had his expectations created by the granting of city permits, having relied upon those permits to make financial commitments, and having taken steps to insure his building was not a health

or safety hazard, may not be subjected to the frustration of those expectations by seeing his permits disappear, his financing evaporate, and his structure being demolished, just because it was "abandoned," without being justly compensated for his loss.

Demolition by governments of buildings in pursuit of urban renewal plans comports with the Takings Clause of the Fifth Amendment where just compensation is tendered to owners, even if the buildings are not unsightly or health and safety hazards. *Berman v. Parker*, 348 U.S. 26, 36 (1954) (holding constitutional Washington, D.C.'s condemnation of a sound and serviceable building in an urban renewal area pursuant to the "police power"). There is no duty to pay just compensation where a building endangers the public safety by being a health or safety hazard. *Lawton v. Steele*, 152 U.S. 133, 136 (1893) ("the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by . . . ."). However, once government has issued a permit for construction of a building, it may not summarily withdraw the permit, and destroy the building, without first showing a clear case of danger to the public, or a violation of the terms of the permit. *Dainese v. Cooke*, 91 U.S. 580, 583-584 (1875) (must be a clear case of departure from permit or existence of public danger before construction can be arrested and buildings destroyed).

The decision of the court of appeals establishes that, by the time the CHO made the decision that the Bridgeport should be demolished, the building was not a health or safety hazard:

> By the time the last hearing was held on October 4, 1991, the Bridgeport was no longer classified as a

> "dangerous" building. It had been secured with steel shutters, was structurally sound, and was not in danger of collapse. Nevertheless, the CHO ordered the Bridgeport demolished on the ground that is was an "abandoned" structure under PCC § 24.15.020.

App. A-7 (footnote omitted).

In *Lucas*, this Court recognized that "confiscatory regulations" of land uses, to pass Constitutional muster under the Takings Clause of the Fifth Amendment, must "do no more than duplicate the result that could have been achieved in the courts-- . . . by the State under its complementary power to abate nuisances that affect the public generally or otherwise.[16]" 112 S.Ct. at 2900. At Footnote 16 this Court noted that

> The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. *Bowditch v. Boston*, 101 U.S. 16, 18-19, 25 L.Ed. 980 (1880); *see United States v. Pacific Railroad*, 120 U.S. 227, 238-239, 7 S.Ct. 490, 495-496, 30 L.Ed. 634 (1887).

112 S.Ct. at 2900 n.16.

Although this Court was addressing regulations that deprived an owner of "all economically viable use of his land," *Id.* at 2894 (emphasis and citations omitted), this Court had earlier addressed deprivations of use that are "one step short of complete." It noted that "we have acknowledged time and

again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Id.* at 2895 n.8 (citations omitted).

Thus, the decision in *Lucas* recognized that regulatory takings could be found where the government's action interfered with "distinct investment-backed expectations" and the relevant regulatory restriction did not act to prevent a nuisance, such as a fire or safety hazard, that was grounded in background principles of state nuisance and property law. Moreover, in *Yeats v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1870), Justice Miller, writing for this Court, held that:

> But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, . . . can, by its mere declaration that it is one [nuisance], subject it to removal by any person supposed to be aggrieved, or even by the city itself.

Id. at 505.

The court of appeals below concluded that "at the time Hoeck took title, he had no right to maintain an abandoned structure." App. A-20 (citing *Lucas* and several sections of the Portland City Code). That conclusion flies in the face of this Court's analysis in *Lucas*, where it held that, under the Takings Clause, reviewing courts must "do more than insist upon artful harm-preventing characterizations," 112 S.Ct. at

2898 n.12, and instead look for "background principles of nuisance and property law that prohibit the uses he [the landowner] now intends . . .." *Id.* at 2901-2902. The proper inquiry is not under what circumstances City ordinances say "abandoned" buildings can be demolished,[7] but whether those circumstances are found in background common law principles of nuisance and property.

Under the Takings Clause of the Fifth Amendment, the city could only constitutionally demolish Mr. Hoeck's "abandoned" building pursuant to the Portland City Code if the background principles of state nuisance law established a building that had been unoccupied for 6 months was a public or private nuisance. For a building to be such a nuisance, it must necessarily be a fire, health or safety hazard. As the Court of Appeals for the D.C. Circuit has observed, a city may, under the police power, destroy a building or structure that is a public safety or health hazard without just compensation. *Miles v. District of Columbia*, 510 F.2d 188, 192 (D.C. Cir. 1975).

In sum, the decision of the court of appeals below, made under Article I, section 18 of the Oregon Constitution, but basing its analysis on this Court's decisions construing the U.S. Constitution's Fifth Amendment, sanctions the city's uncompensated demolition of Mr. Hoeck's building under the "police power." That demolition was predicated, not on the building being a health or safety hazard that would be

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[7] "The Portland City Code provides that abandoned or dangerous structures may be abated pursuant to PCC §§ 24.55.250 and 24.55.300, the latter of which empowers the CHO to order demolition." App. A-7 n.1. The city defines an abandoned structure as "a structure that has been vacant for a period in excess of 6 months . . .." App. G-1 (PCC § 24.15.020).

recognized as a common-law nuisance, but rather on the city's conclusion that the structure was "abandoned."

Holding the city's demolition to be a proper exercise of the "police power" that relieves it of its constitutional obligation to tender just compensation is tantamount to sanctioning essentially any and every municipal demolition decision a government staff desires to make, regardless of the condition and serviceability of the building in question. Petitioner respectfully urges this Court to grant the Petition to establish that local governments cannot demolish buildings without just compensation unless the buildings are common-law private nuisances - public health or safety hazards - and not merely unoccupied, or unattractive.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS, REGARDING THE EXTENT OF A GOVERNMENT'S POLICE POWER TO DEMOLISH A BUILDING ON OTHER THAN STRUCTURAL SAFETY GROUNDS

A. *Nollan, Yee, Hawaii Housing Authority,* and *Loretto* Hold that Permanent Physical Invasions Are *Per Se* Takings for Public Use.

This Court has made clear that physical invasions of private property violate the Fifth and Fourteenth Amendments to the U.S. Constitution. When the government either permanently occupies, or requires property owners to allow

third parties to permanently occupy, private property, and does not compensate owners of that property for the occupation, the government has taken private property in violation of the federal Constitution. *Loretto*, 458 U.S. at 434-435 (when physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred). *Yee*, 112 S.Ct. at 1526 (where government authorizes a physical occupation of property, or actually takes title, the takings clause generally authorizes compensation). *Nollan*, 483 U.S. at 831-832 (taking occurs when permanent physical occupation is achieved by individuals being given permanent right to traverse private real property). Private property can be taken for public use without government actually using the property. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1984) (not necessary that public enjoy or participate in any way in use of property to constitute public use).

A permanent physical occupation is a *per se* taking in violation of the federal constitution. As such, the "intrusion [is] of such an 'unusually serious character' that it constitutes a taking 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.'" Peterson, *The Takings Clause*, 77 Calif. L. Rev. 1299, 1333 (1989) (footnotes omitted).

The city, by entering onto the property of Mr. Hoeck, and demolishing his building, invaded, and permanently occupied, the Bridgeport Hotel. The city's interference with Mr. Hoeck's property was with his right to exclude others from that property, and to make reasonable, and continued beneficial use of the structure. This Court, in *Nollan*, recognized it would be unconstitutional under the Federal Constitution for government to compel landowners to accede to the outright physical occupation of their private lands by

the public traversing across their private beach, to-and-fro. *Nollan*, 483 U.S. at 832.

The court of appeals decided that there was no physical invasion because the city's intrusion was temporary, lasting only long enough for the city to demolish the structure, because the intrusion could have been avoided if Mr. Hoeck had been able to complete construction within the time mandated by the city, and because the property was not taken for public use. App A-17. This decision by the court of appeals is contrary to this Court's decisions in *Nollan, Yee,* and *Loretto*. The entry onto private property and the demolition of a building over the strenuous objection of the property owner is the most intrusive form of government occupation possible. It is far more intrusive than the cable-connector boxes in *Loretto*, the forced tenancies of rental property considered in *Yee*, and the intermittent passage of the public over the private beach in *Nollan*. That it was limited in time to the period of demolition, and thus "temporary," does not remove it from the category of permanent physical occupations. *See Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (where real estate is actually invaded "so as to effectually destroy or impair its usefulness, it is a taking . . ..").

The court of appeals' conclusion that the demolition was not a taking for public use, but rather merely a restriction on use, is inconsistent with this Court's broad and expansive definition of "public use" articulated in *Hawaii Housing Authority*. Moreover, this Court has expressly rejected the argument that the "appropriation of a public easement across a landowner's premises does not constitute taking of a property interest but rather . . . 'a mere restriction on its use.'" *Nollan*, 483 U.S. at 831. Similarly, description of the

out-and-out destruction of an expensive and valuable structure as a restriction on use "is to use words in a manner that deprives them of all their ordinary meaning." *Id.*

It is patently outrageous to conclude, as the court of appeals did, that an otherwise blatantly unconstitutional physical intrusion under the Fifth Amendment may avoid being held unconstitutional merely because Mr. Hoeck could have avoided the demolition by removing his structure from "abandoned" status. The building was "abandoned" because further construction awaited financing - financing that was needed because the city had precipitated Mr. Hoeck's loss of initial financing by summarily withdrawing his conditional use and building permits. The city caused the building to become "abandoned."

B. The Decision Below Conflicts with Interpretations of Both Federal and State Courts.

The decision of the court of appeals directly conflicts with decisions of state courts that have interpreted the constitutional propriety of cities destroying buildings under the "police power" without compensation.[8] The court of

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[8] Professor Mandelker catalogued a number of older state decisions in his review of state demolition statutes in 1969. Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers Over Slum Housing*, 67 Mich. L.Rev. 635 (1969). His conclusion was that the weight of authority supported uncompensated demolition only upon findings of a common-law nuisance:

> Even if a statute does not explicitly provide that only buildings which are in fact nuisances may be demolished, the courts often read such a limitation into the legislation. To qualify for demolition under the

appeals concluded that a city in the exercise of its police power may, without compensating the owner, destroy a building that is nothing more than an "abandoned structure," with "abandoned" meaning unoccupied for over six months.

A broad application of the doctrine that the "police power" does not allow a city to demolish a building that is not a health, safety or fire hazard was made by the Commonwealth Court of Pennsylvania in *King v. Township of Leacock*, 552 A.2d 741 (Pa. Cmmw. 1989). The *King* court held that "an order of demolition . . . is a taking pursuant to the police power, without compensation. . . . [I]n no instance may such action be taken unless it is necessary for the protection of the public health, welfare, and safety." 552 A.2d at 744. The court went on to add that "Demolition of a structure, even if it constitutes an eyesore to its surrounding

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> statutory standard alone is not enough. This interpretation reflects the supposedly well-established principle that legislation may not declare to be a nuisance any use or condition that was not a nuisance at common law . . . . .[D]emolition is an extreme remedy to be ordered only in extreme cases. Demolition has been strictly limited to buildings in such bad physical repair that they present a structural, fire or other physical hazard. [citing, *inter alia*, *Polsgrove v. Moss*, 157 S.W. 1133 (Ky. 1913) (in exercise of police power, city may, without compensation, destroy property which is meanace to safety or health when necessary to protect public)); *Radney v. Town of Ashland*, 75 S. 25 (Ala. 1917) (in order for building to be nuisance, its hazardous character must be unmistakable, the danger imminent, and the use so extraordinary as to leave no doubt it is a nuisance); *Childs v. Anderson*, 73 N.W.2d 280 (Mich. 1955) (fact that buildings were old and dilapidated did not make them a nuisance allowing them to be razed).]

67 Mich. L. Rev. at 647-648 (footnotes omitted).

neighborhood, is improper if it is structurally safe and poses no danger to the public." *Id.*

Another case that imposes similar limitations on the "police power" of cities is *LJD Properties, Inc. v. City of Greenville*, 753 S.W.2d 204 (Tex. Ct. App. 1988). There, the Texas Court of Appeals upheld a determination by the trial court that a structure could not be demolished by the city because it "was not a hazard to the health, safety and welfare of the citizens of Greenville." 753 S.W.2d at 208. The court earlier had recognized that

> the right of a citizen to use his property as he chooses, so long as he harms nobody, is an inherent and constitutional right, [and that] the police power cannot be invoked for abridgement of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare.

Id. at 207.

See also Hart v. City of Dallas, 565 S.W.2d 373, 379 (Tex. Civ. App. 1978) (building cannot be destroyed unless found to be a nuisance, and neither the Legislature nor the city council can by a declaration make that building a nuisance which is not in fact a nuisance); *Crossman v. Galveston*, 247 S.W. 810, 813 (Tex. 1923) ("property, not a nuisance within itself or under the common law, cannot be destroyed without the judgment of a court finding that it is in fact a nuisance.").

The decision of the court of appeals also conflicts with a decision of the United States Court of Appeals for the District of Columbia Circuit. In a 1975 building demolition

case asserting a procedural due process claim, Circuit Judge Tamm, writing for the majority, stated that "A municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health." *Miles*, 510 F.2d at 192.

III.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE FEDERAL COURTS AND STATE COURTS REGARDING THE EXTENT OF A GOVERNMENT'S POLICE POWER TO DEMOLISH A BUILDING ON OTHER THAN STRUCTURAL SAFETY GROUNDS

State courts from Texas and Pennsylvania, to Michigan, Alabama and Kentucky and the federal court of appeals in Washington, D.C., have all construed the Takings Clause of the Fifth Amendment, or its state constitutional equivalent, to require a building to be a common law nuisance, or at least a fire or safety hazard, before it may be demolished by a city without just compensation.[9] Many

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[9] Arguably, the rule in Oregon is in accord with these jurisdictions, in spite of the contrary conclusion of the court of appeals below. For example, in *Willard v. City of Eugene*, 550 P.2d 457, 458 (Or.App. 1976), the destruction of a private residence was based upon the city's determination the structure was "a dangerous building . . . which presented and fire and health hazard." In *Shaffer v. City of Winston*, 576 P.2d 823, 824 (Or.App. 1978), the Oregon Court of Appeals held that government could act to "destroy a building that threatens the public safety." Finally, in *Benson v. City of Portland*, 850 P.2d 416 (Or.App. 1993), *rev. denied*, 862 P.2d 255 (Or. 1993), the Oregon Court of Appeals, upholding the constitutionality of the same sections of the PCC at issue in the instant case, never even considered whether the abandoned building demolition provisions of the

courts have made this construction notwithstanding the existence of statutes or zoning ordinances to the contrary, according to Professor Mandelker, 67 Mich. L. Rev. at 647.

On the other hand, the Supreme Court of Arizona, the California District Court of Appeal, the Illinois Appellate Court, and a panel from the Court of Appeals for the Fifth Circuit, have held, as the court of appeals did below, that municipalities have broad authority to define public nuisances, notwithstanding the common law of nuisance, and to destroy without compensation buildings meeting the definition of public nuisance. In 1966, the Supreme Court of Arizona held that a municipality has the right to define public nuisances and to abate them. *Moton v. City of Phoenix*, 410 P.2d 93, 94-95 (Ariz. 1966) (property taken from owner and destroyed in exercise of police power is not taken by inverse eminent domain).

In *Perepletchikoff v. City of Los Angeles*, 345 P.2d 261 (Cal. Dist. Ct. App. 1959), the California District Court of Appeal considered a challenge to a building board order that a building be demolished because it was made of wood and alterations to bring it up to code would cost more than 50% of its replacement cost.. The court concluded this was "a reasonable exercise of the police power" and was not

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Portland City Code might be a physical taking. 850 P.2d at 421 (Rossman, P.J., dissenting). Thus, in every state case relied upon by the court of appeals, there was no basis for concluding an abandoned building was a nuisance unless it was a safety, health or fire hazard.

On the other hand, the Oregon Supreme Court has held that "a building must be a nuisance in fact before it may be condemned or abated. The city council may not arbitrarily or unreasonably declare any structure a nuisance." *Why v. City of Marshfield*, 5 P.2d 696, 702 (Or. 1931).

unconstitutional. *Id.*.at 267. Similarly, in 1982 the Appellate Court of Illinois concluded that it was not unconstitutional for the City of Alton, Illinois to order demolition of a building that was boarded up and not a fire hazard because "The determination, therefore, of whether the building is 'dangerous and unsafe' must be made without regard to these temporary protective measures." *City of Alton v. Carroll*, 440 N.E.2d 290, 294 (Ill. App. Ct. 1982). The court concluded that "The court's decision must be based . . . upon whether public necessity requires the removal of the offending structure." *Id.*. at 296.

In *Traylor v. City of Amarillo, Texas*, 492 F.2d 1156 (5th Cir. 1974), Circuit Judge Goldberg, writing for a panel of the Fifth Circuit, rejected the argument that a building could only by demolished by the city if it had been judicially determined to be a nuisance in fact. Relying on *Euclid v. Ambler Realty*, 272 U.S. 365 (1926), the court first determined that "the common law of nuisance . . . would not be controlling" in delineating the scope of the police power. 492 F.2d at 1158. The court then affirmed the district court's conclusion that the ordinances authorizing demolition of a building "are a legitimate and compelling exercise of the city's police power . . .." *Id.* at 1159.

These cases show there is a distinct split of opinion, not only between inferior state courts and state courts of last resort, but between federal courts of appeal, regarding whether building demolition comports with the Fifth Amendment when demolition is not based on the principle that the building first must be a common law nuisance. As Professor Mandelker has observed, this is a "principle that courts have discarded in other areas of land use regulation in favor of more modern due process interpretations which

emphasize the reasonableness of the control." Mandelker, 67 Mich. L.Rev. at 647. But, as he notes, building demolition cases relying on this "modern" interpretation are not typical. *Id.* The direct conflict presented by these cases on such a significant issue should be resolved by this Court.

IV.

THE ABILITY OF A GOVERNMENT TO USE ITS POLICE POWER TO DEMOLISH A BUILDING THAT IS NOT A COMMON-LAW NUISANCE BY BEING A HEALTH OR SAFETY HAZARD IS AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT

In order for the nation's lower courts to properly adjudicate takings claims involving the demolition of privately-owned buildings under the police power, it is critical they comply with this Court's decision in *Lucas* that established that the Fifth Amendment requires that deprivation of use without compensation must occur only when the use is a common-law private nuisance. Indeed, the existence of a private nuisance as a condition precedent is the key factor in determining whether the Fifth Amendment's Takings Clause provides protection to property owners from government legislative schemes to enhance neighborhood aesthetics and abate unoccupied structures at the expense of property owners without use of eminent domain.. This is clearly shown by the decision below, where the court of appeals easily made a decision upholding the city's uncompensated demolition even after the city's hearings officer, and the circuit court, had recognized that Mr. Hoeck's building was secured against trespass and was neither a health or safety hazard.

This Court in *Berman*, 348 U.S. at 33, recognized that aesthetic considerations were sufficient to justify the compensated demolition of privately-owned buildings under the police power. Other courts have already held that aesthetics alone are insufficient to justify uncompensated deprivation of property interests under the police power. For example in *Redevelopment Auth. of Oil City v. Woodring*, 445 A.2d 724 (Pa. 1982), the Pennsylvania Supreme Court examined whether the city council, in order to improve the "general lack of aesthetics" of Oil City, under the Takings Clause of the state constitution,[10] could empower the city redevelopment authority to require above-ground utilities to be relocated underground at owners' expense. The court held that aesthetic reasons are insufficient to promote public safety and are an insufficient basis on which to exercise police power without compensation. *Id.* at 727-728. *Cf. State v. Jones*, 290 S.E.2d 675 (N.C. 1982) (reasonable regulations based on aesthetic considerations alone can constitute a valid basis for the exercise of police power); *Parking Assn. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994) (aesthetics ordinance requiring landscaping and tree planting in existing surface parking lots is not unreasonable even if intended only to improve aesthetics, and is not a taking under federal takings analysis).

Similarly, in *Dept. of Agric. v. Mid-Florida Growers*,

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[10] "Article I, § 10 of the Pennsylvania Constitution provides, in pertinent part:

> [N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

445 A.2d at 726 n.3.

521 So.2d 101 (Fla. 1988), the Florida Supreme Court held that it violated the Takings Clause of the Fifth Amendment for the state to destroy healthy orange trees to prevent spread of citrus canker pursuant to its police power. The court reasoned that absent a showing that trees were diseased, the state's action under the police power was one of conferring a public benefit rather than preventing a public harm, for which the trees' owners were entitled to compensation. *Compare*, *Lucas*, 112 S.Ct. at 2898-2899 (holding that critical issue is whether use is a private nuisance, not whether use has been characterized by government as public harm).

Professor Mandelker has written that "the cases have generally held that building demolition for mere dilapidation or age is not enough unless there is an imminent danger traceable to the structure's physical condition.[62]" 67 Mich. L. Rev. at 648. At Footnote 62, he notes that "If the building is in a dangerous condition, that may be enough to justify demolition (citing cases). This line of authority casts doubt on those statutes which would authorize demolition of structures on the basis of nonstructural conditions." *Id.* at n.62 (citations omitted). Such nonstructural conditions necessarily must include aesthetic considerations and lack of occupancy.

In *Benson v. City of Portland*, the ordinances pursuant to which the city demolished Mr. Hoeck's building were facially challenged by the owner of an unoccupied structure. The court upheld the ordinances as being constitutional. In dissent, Presiding Judge Rossman wrote that Portland, by mandating that derelict buildings be repaired and "reoccupied" or destroyed was taking unto itself private resources in use for the common good and that this was a compensable taking. 850 P.2d at 425 (Rossman, P.J., dissenting).

This Court has made clear that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Additionally , this Court has most recently held that property rights will no longer be "relegated to the status of a poor relation" vis-a-vis the other rights guaranteed in the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 2320 (1994). Lower courts are never going to prevent regulatory abuses by government, and provide essential protection to private property, if they do not recognize that government "by mere *ipse dixit* may not transform private property into public property without compensation." *Lucas*, 112 S.Ct. at 2901 (citation omitted). The instant case illustrates the need for a uniform recognition that the Fifth Amendment prohibits governments from exercising the police power to demolish private property without compensation for aesthetic reasons, or because it is unoccupied, unless that property is a common law private nuisance. The split of authority concerning the appropriate bounds of this exercise of the police power under the Takings Clause cries out for resolution by this Court - it is a matter of exceptional importance, and merits review by this Court.

CONCLUSION

The City of Portland's abandoned buildings ordinance is intended to achieve both public health and safety goals, as well as aesthetic purposes. Based on the record, it is apparent the city has concluded it can achieve its aesthetic objective without compensating building owners. The trial court and the court of appeals agreed with the city. Nonetheless,

promoting the aesthetic qualities of the city is a responsibility of the city's residents as a whole. Property owners whose buildings become unoccupied for more than six months - and whose buildings are neither health or safety hazards that would be recognized as private nuisances at common law - should not be singled out to finance the costs of providing neighborhood beautification for the city's residents.

In upholding the city's actions, the court of appeals overlooked the very purpose of the Federal Constitution's Takings Clause. That purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The decision of the court below completely ignores this purpose.

This case is of great concern to commercial building owners who are already heavily burdened with an array municipal regulatory demands.. The precedent established by the court of appeals licenses the high-handed activities of local governments operating pursuant to the police power. The extent to which owners can be subjected to municipal actions to demolish unoccupied buildings - a status in this case precipitated by the city itself - is an issue of exceptional importance and wide-ranging impact.

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari.

DATED: November 8, 1995.

Respectfully submitted,

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APPENDIX A

HOECK v. CITY OF PORTLAND
Cite as 57 F.3d 781 (9th Cir. 1995)

Hans HOECK, Plaintiff-Appellant

v.

CITY OF PORTLAND, a municipal corporation, Defendant-Appellee

No. 93-35691

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Nov. 1, 1994

Decided June 12, 1995

As Amended July 10, 1995

Building owner whose partially renovated but vacant building had been demolished by city brought action violated his substantive due process rights and also violated Oregon Constitution. The United States District Court for the District of Oregon, Robert C. Belloni, J., granted summary judgement for city, and owner appealed. The Court of Appeals, Fletcher, Circuit Judge, held that : (1) owner adequately pleaded substantive due process claim over which district court could exercise subject matter jurisdiction; (2) district court properly exercised pendent jurisdiction over claims under Oregon Constitution; (3) demolition did not violate owner's substantive due process rights; and (4) demolition did

not constitute either physical or regulatory taking under Oregon Constitution.

Affirmed.

1. Federal Courts 776

Court of Appeals reviews de novo whether district court had jurisdiction.

2. Federal Courts 776

Court of Appeals reviews de novo district court's grant of summary judgment, viewing evidence in light most favorable to nonmoving party to determine whether any issues of material fact exist and whether district court correctly applied relevant substantive law. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Federal Courts 243

Although building owner's complaint against city did not use words "substantive due process" complaint sufficiently alleged substantive due process claim in connection with city's demolition of partially renovated but vacant building to vest federal district court with subject matter jurisdiction. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 1331.

4. Federal Courts 15

District court that had subject matter jurisdiction over building owner's substantive due process claim against city in connection with demolition of partially renovated but vacant building was justified in exercising pendent jurisdiction over owner's state inverse condemnation claim. U.S.C.A.

Const.Amend. 14; U.S.C.A.§§ 1331, 1367.

5. Federal Courts 14.1

District courts have discretion to hear pendent state claims where there is substantial federal claim arising out of common nucleus of operative fact. 28 U.S.C.A. § 1367 (a).

6. Constitutional Law 280
Eminent Domain 270
Health and Environment 32

City-ordered demolition of partially renovated but vacant building without paying compensation to owner did not violate owner's substantive due process rights; financing for renovation project had been withdrawn and building remained vacant for more than three years, and city could rationally conclude that there was greater danger to public from unoccupied substandard building than from occupied one; moreover, state law provided procedure for pursuing compensation through inverse condemnation. U.S.C.A. Const. Amend. 14.

7. Constitutional Law 251

Substantive due process provides considerable protection for fundamental rights. U.S.C.A. Const.Amend. 14.

8. Eminent Domain 2(5)

City-ordered demolition for partially renovated but vacant building was not physical taking that entitled owner to compensation under Oregon Constitution; demolition was not physical taking for public use, but merely restriction on use of property to maintain structure that had been abandoned for

over three years, and owner could have obeyed city's order to repair building and put it to use, thus avoiding need for city to demolish building. Or. Const. Art . 1, § 18.

9. Eminent Domain 2(1.2)

Otherwise valid exercise for police power constitutes taking for which compensation is due if owner suffers permanent, physical occupation of property; however, state may enter property to enforce valid land-use regulation and destroy offending property, and such conduct does not amount to physical occupation even where government's activity has permanent effect. U.S.C.A. Const.Amend. 5.

10. Eminent Domain 2(5)

City's demolition of partially renovated but vacant building did not amount to regulatory taking for which compensation was due under Oregon Constitution; demolition did not deprive owner of all economically beneficial use of its property, and remaining lot was suitable for appropriate; development; moreover, since owner had no right to use his property to maintain abandoned structure at time he took title, he did not have reasonable, investment-backed expectations. Or. Const. Art. 1, § 18.

11. Zoning and Planning 35, 70

Under Oregon Constitution, city may wholly exclude particular use of property if it has rational basis for doing so, and aesthetic concerns alone may warrant exercise of police power. Or. Const. A. 1, § 18.

12. Eminent Domain 266

To state cause of action for inverse condemnation under Oregon Constitution, building owner had to show that his property was taken for public use. Or. Const. Art. 1, § 18.

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James Esterkin and Marc Zwerling, Winfree, Fearey & Zwerling, Portland, OR, for the plaintiff-appellant (on the briefs).

Tracy Pool Reeve, Deputy City Attorney, Portland, OR, for the defendant-appellee.

Appeal from the United States District Court for the District of Oregon.

Before: FLETCHER, NELSON, and RYMER, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiff Hans Hoeck appeals from a Summary judgment for the defendant City of Portland (the "City"). Hoeck argues on appeal that the district court erred because the demolition of his building constitutes a violation of substantive due process and is a taking under Oregon law. Hoeck also argues that he is entitled to a declaration under 28 U.S.C. § 2201 that he is not liable for demolition costs. We have jurisdiction, 28 U.S.C. § 1291, and affirm.

FACTS

Hoeck was the owner of the Bridgeport Hotel, a vacant six- story building located in Portland, Oregon. During 1984 and 1985, Hoeck made plans to renovate the Bridgeport and to add four additional stories, converting it into a ten-story office building. After obtaining a financial commitment from a lender and a building permit from the City, Hoeck commenced the renovation project. However, shortly after the project began, the City suspended construction pending a further review of his plan. About six months later, Hoeck was permitted to recommence work. Shortly thereafter, on March 6, 1986, Hoeck's financing was discontinued due to the insolvency of his lender, and he was never able to obtain replacement financing. Hoeck expended substantial sums - approximately $1 million - in connection with the project.

More than three years later, on May 15, 1989, the City took its first action against the Bridgeport On that date, pursuant to the Portland City Code ("PCC"), the Bureau of Buildings filed a complaint with the Code Hearings Officer ("CHO") pursuant to authorization under PCC §§ 24.55.250 and 24.55.300: It alleged that the Bridgeport was an "abandoned" structure in violation of PCC § 24.15.020. Under the PCC, an abandoned structure is defined as "a structure that has been vacant for a period in excess of six months, or any period less than six months when a vacant structure or portion thereof constitutes an attractive nuisance or hazard to the public." PCC § 24.15.020. The complaint also alleged that the Bridgeport was a dangerous structure under PCC § 24.15.060.

Administrative bearings were held before the CHO on five occasions. During the course of these hearings, the City submitted evidence that the Bridgeport was attracting

transients and drug users, contained substantial amounts of debris, and had numerous structural flaws due to its incomplete state. By the time the last hearing was held on October 4, 1991, the Bridgeport was no longer classified as a "dangerous" building. It had been secured with steel shutters, was structurally sound, and not in danger of collapse. Nevertheless, the CHO ordered the Bridgeport demolished on the grounds that it was an "abandoned" structure under PCC § 24.15.020.[1] The CHO's supplemental order, issued on October 4, 1991, further stated:

> The structure . . . in its current partially complete and gutted condition, remains a visual blight upon the surrounding neighborhood.
>
> There is nothing in the record of this proceeding that would lead me to believe that further delay in the demolition of this structure would do anything other than inflict this ugly and potentially hazardous building on the neighborhood and the city for some additional, indefinite time.

On two occasions, Hoeck sought review of the demolition order in Multnomah County Circuit Court. Both times the orders were held to be enforceable. On July 27, 1992, the City began demolition and completely removed the structure from the property

Hoeck filed his action in federal court on January 26, 1993. His complaint set forth three causes of action: 1) an action under 28 U.S.C. § 1983 claiming a violation of substantive

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[1] The Portland City Code provides that abandoned or dangerous structures may be abated pursuant to PCC §§ 24.55.250 and 24.55.300, the latter of which empowers the CHO to order demolition.

due process; 2) a claim for declaratory relief under 28 U.S.C. § 2201 that because the demolition was in violation of his constitutional rights, the City could not assess its demolition costs against him; and 3) a state law inverse condemnation claim based on the district court's pendent jurisdiction, 28 U.S.C. § 1367. Each party submitted a summary judgment motion on all the claims. The district court denied Hoeck's motion, granted the City's, and dismissed Hoeck's complaint This timely appeal followed.

STANDARDS OF REVIEW

[1] We review de novo whether the district court had jurisdiction. *Carson Harbor Village Ltd. v. City of Carson,* 37 P.3d 468, 474 (9th Cir. 1994); *Christensen v. Yolo County Bd. of Supervisors,* 995 P.2d 161, 163 (9th Cir. 1993).

[2] We review de novo the district court's grant of summary judgment, viewing the evidence in the light most favorable to the nonmoving party to determine whether any genuine issues of material fact exists and whether the district court correctly applied the relevant substantive law. *Christensen,* 995 F.2d at 163.

"[W]e may affirm on any basis fairly supported by the record.'" *Janicki Logging Co. v. Mateer,* 42 F.3d 561, 564 (9th Cir. 1994) (quoting *City of Las Vegas v. Clark County,* 755 F.2d 697, 701 (9th Cir. 1985)).

JURISDICTION

Although the City challenged jurisdiction in the district court, neither party does so on appeal. We must nevertheless determine *sua sponte* whether we have jurisdiction. *FW/PBS,*

Inc. v. City of Dallas, 493 U.S. 215, 231, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603 (1990) ("federal courts are under an independent obligation to examine their own jurisdiction"); *Harris v. Provident Life & Accident Ins. Co.,* 26 F.3d 930, 932 (9th Cir. 1994). We review the existence of subject matter jurisdiction in the district court de novo. *Allah v. Superior Court of California,* 871 F.2d 887, 890 (9th Cir. 1989).

The district court determined that it had federal question jurisdiction over the claim for declaratory relief and the substantive due process claim, 28 U.S.C. § 1331, and pendent jurisdiction over the state takings claim, 28 U.S.C. § 1367. We examine the jurisdiction as to each of these claims. We conclude that we have jurisdiction over the substantive due process claim and the state takings claim. The jurisdiction over the claim for declaratory relief is unclear and its resolution convoluted. Since we find the claim meritless in any event, we do not decide whether we have jurisdiction over it.

OVER SUBSTANTIVE DUE PROCESS CLAIM

[3] The plaintiff contends that the district court properly based its jurisdiction on his claim that the City violated his right to substantive due process under the Fourteenth Amendment We agree.

The Supreme Court has set forth the general rule that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims,'" *Albright v. Oliver,* ___ U.S.

___, 114 S.Ct. 807, 813, 127 L.Ed.2d 114 (1994) (plurality) (quoting *Graham v. Connor,* 490 US. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989)). At first blush, the substantive due process claim would appear to be precluded by a more specific claim based on the Takings Clause. However, in *Sinaloa Lake Owners Association v. City of Simi Valley,* 882 F.2d 1398, 1408-09 n.10 (9th Cir. 1989), *cert denied,* 494 US. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), we held that *Graham* does not bar a companion substantive due process claim alleging that "the government has used its power in an abusive, irrational or malicious way." *Id.* at 1408-09 n.10; *see also Bateson v. Geisse,* 857 F.2d 1300, 1303 (9th Cir. 1988) (finding that substantive due process claim is not subject to exhaustion requirement of taking claim). Thus, we must determine whether Hoeck's section 1983 claim falls within the *Sinaloa* exception to *Graham.*

It is only with some difficulty that we are able to discover a substantive due process claim in Hoeck's pleadings. The words "substantive due process" do not appear in Hoeck's Complaint.[2] It was only after the City argued that

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[2] In Count I of his complaint, Hoeck alleges as follows:

> The City's demolition of the Bridgeport Hotel under color of its Ordinance was undertaken with the intention to deprive, and has deprived, Hoeck of his rights, privileges and immunities secured by the Constitution of the United States, and of his property without due process of law.
>
> As it was applied to Hoeck, the Ordinance is in violation of Hoeck's rights under the Fifth and Fourteenth Amendments of the United States Constitution and therefore unenforceable for at least the following reasons:
>
> * * * * * *

the district court lacked subject matter jurisdiction that Hoeck first breathed the words "substantive due process" and characterized his claim as challenging the City's authority to "demolish the Bridgeport Hotel *solely* because of its unoccupied status irrespective of the City's motives, the City's procedures or whether the City pays compensation." *Plaintiff's Response to Defendant's June 15, 1993 Memorandum,* at 3. On appeal, Hoeck did not argue in terms of substantive due process until his reply brief, apparently triggered by the City's mention that it had challenged jurisdiction below. In the brief, he asserted that his "substantive due process claim is based on the government's failure to treat a citizen with some minimal standard of rationality and fairness."

While the claim is certainly not artfully asserted in the complaint, we read it charitably, and since the City did not appeal the district court's finding of jurisdiction, we do not fault Hoeck's delay in addressing it directly until his reply. We somewhat reluctantly conclude that Hoeck advances a claim of substantive due process sufficient to fall within the *Sinaloa* exception. Therefore, we conclude that we have subject matter jurisdiction over this claim.

•the initial notice of hearing failed to inform Hoeck that the City sought to demolish the Bridgeport Hotel solely because it was unoccupied, and

•Schatzer [the CHO] lacked authority under the Ordinance to order the demolition of the Bridgeport Hotel solely because it was unoccupied.

Complaint ¶¶ 29-30.

OVER PENDENT STATE TAKINGS CLAIM

[4] We next consider whether the district court properly exercised pendent jurisdiction over the state inverse condemnation claim. We conclude that it did.

[5] District courts have discretion to hear pendent state claims where there is a substantial federal claim arising out of a common nucleus of operative fact. 28 U.S.C. § 1367(a); *United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). This is a "doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988). The court must weigh "considerations of judicial economy, convenience and fairness to the litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims." *Gibbs,* 383 U.S. at 726. However, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer footed reading of applicable law." *Id.* If "state issues substantially predominate, . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals." *Id.*, 383 at 726-27, 86 S.Ct. at 1139.

During the course of summary judgment proceedings, the City moved to dismiss the inverse condemnation claim. The parties briefed the issue of whether pendent jurisdiction should be exercised over this claim. The district court found that it had jurisdiction over the federal substantive due process claim and denied the City's motion to dismiss the pendent state claim.

We defer to the discretion of the district court, recognizing that "the district court is in the best position to judge the extent of resources invested in a case." *Schneider v. TRW, Inc.*, 938 F.2d 986, 993-94 (9th Cir. 1991).

OVER REQUEST FOR DECLARATORY RELIEF

Hoeck's other claim is brought under the Declaratory Judgment Act, 28 U.S.C. § 2201, and seeks a declaration that he is not liable for the demolition costs because the demolition was in violation of his substantive due process rights. He asserts that jurisdiction is proper here based on 28 U.S.C. § 1331. The nature of declaratory relief often makes the inquiry into the propriety of jurisdiction difficult Accordingly, because we find the merits of this claim insubstantial, *see* Part II of the Discussion, we decline to resolve the jurisdictional question in this case. *Lee v. City of Beaumont*, 12 F.3d 933, 937 (9th Cir. 1993); *Claw v. U.S Dep't of Housing and Urban Dev.*, 948 F.2d 614, 616 n. 2 (9th Cir. 1991) ("[W]here an appeal presents difficult jurisdictional questions, we may forego the resolution of these issues if the merits of the appeal are insubstantial.").

DISCUSSION

I. SUBSTANTIVE DUE PROCESS CLAIM

[6] Hoeck claims first that the demolition of his building without paying compensation violated his substantive due process rights. We disagree.

[7] Viewing the record in the light most favorable to the plaintiff, we must determine whether a reasonable jury

could find that the City's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926); see also *Halverson v. Skagit County*, 42 F.3d 1257, 1261-63, *amended*, (9th Cir. 1994). Substantive due process provides considerable protection for fundamental rights. *Albright v. Oliver*, ___ U.S. ___, 114 S. Ct 807, 812, 127 L.Ed.2d 114 (1994). Here, however, because the plaintiff's claim is not based on a fundamental right, "we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *Halverson*, 42 F.3d at 1262 (quoting *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994)) (emphasis in original); see also *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir.), *cert denied*, ___ U.S. ___, 115 S. Ct. 193, 130 L.Ed.2d 125 (1994).

We agree with the district court that the City's demolition of the plaintiffs vacant building had a rational basis. The City had ample authority under the Portland City Code to abate abandoned buildings. *See* PCC § 24.44.250(h)(l) ("Abandoned structures as defined in this Chapter shall be abated pursuant to the provisions of Sections 24.55.250 or 24.55.300."). We also agree with the district court that the City could rationally conclude that there is "a greater danger to the public from unoccupied substandard buildings than from occupied ones." *Shaffer v. City of Winston*, 33 Or. App. 391, 576 P.2d 823, 824 (1978). Indeed, even the plaintiff acknowledges that the defendant had the authority, under its police power, to raze the Bridgeport. Finally, because Oregon state law provides a procedure for pursuing compensation through an inverse condemnation, there is nothing clearly

arbitrary and unreasonable about the City's failure *sua sponte* to pay compensation. *Halverson,* 42 F.3d at 1262-63.

We conclude that as matter of law, no reasonable jury could find that the City has acted in a clearly arbitrary and unreasonable manner. Accordingly, we affirm the district court's grant of summary judgment for the defendant on the plaintiff's substantive due process claim.

II. REQUEST FOR DECLARATORY RELIEF

Hoeck's claim for declaratory relief rests on his contention that he is not liable for demolition costs because the uncompensated demolition violated his substantive due process rights. We have determined that the City did not violate Hoeck's substantive due process rights. Consequently, we find that Hoeck's claim for declaratory relief is likewise without merit.

III. STATE LAW TAKING CLAIM

Hoeck's final claim is that the district court erred by ruling that the City's action did not constitute a taking under Oregon law. Hoeck contends that the demolition of the Bridgeport Hotel entitles him to compensation in the equivalent of an inverse condemnation action. Hoeck argues that compensation is due because the demolition constituted a physical invasion of his property, denied him all economically viable use of his property, and failed to advance a legitimate state interest sufficient to outweigh the burden placed on his property interests. We find that these claims lack merit and affirm the district court.

Article I, section 18 of the Oregon Constitution provides that "[p]rivate property shall not be taken for public use . . . without compensation." "The basic thrust of this constitutional provision is generally the same as the 'takings' provision of the Fifth Amendment to the federal constitution." *Ferguson v. City of Mill City*, 120 Or.App. 210, 852 P.2d 205, 213 (1993) (citing *Suess Builders v. City of Beaverton*, 294 Or. 254, 656 P.2d 306, 310 n.5 (1982); *Cereghino v. State Highway Commission*, 230 Or. 439, 370 P.2d 694 (1962)). Oregon law is identical to Fifth Amendment "physical" takings law. *Id.* Thus, while Oregon law ultimately controls, we rely to some extent on federal takings law to resolve Hoeck's state inverse condemnation claim.

A. *Physical Taking*

[8] Hoeck argues first that the demolition of his building is a physical taking that entitles him to compensation. We disagree.

[9] An otherwise valid exercise of the police power constitutes a taking for which compensation is due if the owner suffers a permanent, physical occupation of the property. *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, ___, 112 S.Ct. 2886, 2900, 120 L.Ed.2d 798 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-28, 102 S.Ct. 3164, 371-72, 73 L.Ed.2d 868 (1982); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 20 L.Ed. 557 (1871); *Ferguson*, 852 P.2d at 207. Physical invasions have been found where the government interferes with the owner's "right to exclude." *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) (public access to pond); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 107

S.Ct. 3141, 97 L.Ed.2d 677 (1987) (public easement to beach); *Loretto*, 458 U.S. at 427-28, 102 S.Ct. at 3171-72 (installation of cable); *Pumpelly*, 80 U.S. at 166 (flooding); *Hawkins v. City of La Grande*, 315 Or. 57, 843 P.2d 400 (1992) (one-time flooding). However, the state may enter property to enforce a valid land-use regulation and destroy the offending property. This does not amount to a physical occupation even where the government's activity has a permanent effect *See Miller v. Schoene*, 276 U.S. 272, 278, 48 S.Ct. 246, 247 (1928) (permitting state entomologist to enter property and destroy diseased trees without affecting a taking); *see also Bowditch v. Boston*, 101 U.S. 16, 18-19, 25 L.Ed. 980 (1880) (denying compensation to owners whose houses were destroyed to prevent spread of fire); *Shaffer*, 576 P.2d at 824-25 (finding that city may enter to demolish substandard vacant building without compensating owner).

The demolition of the Bridgeport Hotel was not a physical taking for public use. To the contrary, it was a restriction on the use of the property to maintain an abandoned structure. The Portland Regulations did not interfere with Hoeck's right to exclude. Indeed, if Hoeck had obeyed the City's order to repair the structure and put it to use, it would not have been necessary for the City to enter his property to enforce its regulations. *Cf Yee*, 112 S.Ct. at 1528 ("[T]he government affects a physical taking only when it *requires* the land owner to submit to the physical occupation of his land.") (emphasis added); *Ferguson*, 852 P.2d at 207 (same). Because the City's presence was temporary, and its entry avoidable, Hoeck has suffered no permanent physical invasion of his ownership interest in his property. Accordingly, we find his claim of a physical taking to be without merit.

B. *Regulatory Taking*

[10] Hoeck argues next that the demolition was a regulatory taking because the City's action denied him all economically viable use of his property and failed to advance a legitimate state interest sufficient to outweigh the burden placed on his property interests. We disagree.

[11, 12] Under Oregon law, "[a] property owner has a high threshold to surmount in order to obtain compensation from the government for losses occasioned by a regulation of property that serves a legitimate governmental objective." *Benson v. City of Portland,* 119 Or.App. 406, 850 P.2d 416, 420 (1993), *rev. denied,* 318 Or. 24, 862 P.2d 1304 (1993). A city may wholly exclude a particular use of property if it has a rational basis for doing so, and "aesthetic concerns alone may warrant an exercise of the police power." *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255, 262 (1965). Furthermore, to state a cause of action for inverse condemnation, Hoeck must show that his property was taken for a public use. *Willard v. City of Eugene*, 25 Or. App. 491, 550 P.2d 457, 458 (1976); *cf.* Jeb Rubenfeld, *Usings,* 102 Yale L.J. 1077 (1992) (arguing for "usings" requirement in federal takings law).

In the past, demolition cases have not been found to constitute a taking under Oregon law. In *Willard v. City of Eugene,* an Oregon Court of Appeals held that a demolition is not a taking for public use because the city does not acquire any right or thing for public use by its action. 550 P.2d at 459. In *Shaffer v. City of Winston,* the court held that the demolition of a vacant or abandoned substandard building is within a municipality's police power and does not constitute a compensable taking. 576 P.2d at 825. "The general rule is that a municipality in the exercise of its police power may,

without compensating the owner, destroy a building that threatens the public safety where, after reasonable notice and opportunity, the owner fails to remedy the dangerous condition." *Id.*

More recently, in *Dodd v. Hood River County*, 317 Or. 172, 855 P.2d 608 (1993), the Oregon Supreme Court clarified the proper analysis under Oregon law for regulatory takings. The court addressed whether a zoning regulation prohibiting the construction of a family dwelling in a forestry zone constituted a taking in violation of the Oregon Constitution and concluded that it did not. The *Dodd* court first determined that zoning regulations that limit the uses of property do not constitute a "taking of private property for public use." *Id.* 855 P.2d at 614. The court acknowledged the possibility that the Fifth Amendment may afford greater protection against takings, *id.*, and went on to apply the following test under Oregon law:

> Where a zoning designation allows a landowner *some substantial beneficial use* of his property, the landowner is not deprived of his property nor is his property "taken." Such a loss, if any, is "damnum absque injuria."

Id. (quoting *Suess Builders*. 581 P.2d at 50 (emphasis added in original)). The *Dodd* court explicitly declined to make a landowner's "investment-backed expectations" part of a regulatory takings analysis. *Id.* However, the court concluded that such expectations, if relevant, must be reasonable to support a claim for a taking. That is, reasonable "investment-backed expectations must take into account the current state of the law [at the time the property is purchased], as well as the government's power to change the law." *Id.* at 616.

Applying these rules to the case at hand, we hold that the City's demolition of the Bridgeport is not a regulatory taking under Oregon law. As *Shaffer*, 576 P.2d at 825, and *Willard*, 550 P.2d at 458-59, demonstrate, the City acts well within the scope of its police power by removing abandoned structures. Furthermore, the demolition did not deprive Hoeck of all economically beneficial use of his property. *See Dodd,* 855 P.2d at 616. Hoeck argues that the demolition completely destroyed his building an indisputable claim. However, the lot remains and is suitable for appropriate development Finally, the regulation has not interfered with Hoeck's reasonable, investment-backed expectations. *See Id.* Under the law at the time Hoeck took title, he had no right to use his property to maintain an abandoned structure. *Lucas,* ___ U.S. at ___, 112 S.Ct. at 2895; PCC § 24.55.100; PCC § 24.55.250(h)(1); PCC § 24.55.300. Therefore, even if Hoeck's property interest is narrowed to include only his building, he suffered no taking of an existing property interest and no interference with his reasonable expectations.

We conclude that Hoeck's claim for a regulatory taking under Oregon law is without merit

AFFIRMED.

APPENDIX B

FILED
AUG 15, 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HANS HOECK,	)	
	)	
Plaintiff-Appellant,	)	No. 93-35691
	)	
	)	D.C. No. CV-93-98-BE
v.	)	
	)	
CITY OF PORTLAND, a municipal corporation,	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: FLETCHER, D.W. NELSON, and RYMER, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HANS HOECK,	)	
	)	
Plaintiff,	)	Civil No. 93-09-BE
vs.	)	
	)	O P I N I O N
CITY OF PORTLAND, a municipal corporation,	)	
	)	
	)	
Defendant.	)	
	)	

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BELLONI, J.

Plaintiff Hans Hoeck brings this action against defendant City of Portland asserting claims arising from defendant's demolition of his property. He seeks damages based on defendant's alleged taking of his property in violation of 42 U.S.C. § 1983 and a declaration that he is not liable for the costs of demolition. Plaintiff also asserts a pendent state claim for inverse condemnation. Defendant asserts a counterclaim for civil penalties and demolition costs.

The matters before the Court are the parties' cross-motions for summary judgment. Plaintiff moves for partial summary judgment on his civil rights and inverse condemnation claims on the issue of liability. He also moves for summary judgment on his claim for declaratory relief. Defendant moves to dismiss or, in the alternative, for summary judgment.

I grant defendant's motion for summary judgment.

BACKGROUND

The following facts are drawn primarily from the Order re: Stipulated Facts, filed by the parties on June 3, 1993.

Plaintiff was the owner of the Bridgeport Hotel (the Bridgeport), a vacant, six-story structure located at 5-13 N.E. 3rd Avenue in Portland, Oregon. During 1984 and 1985, plaintiff made plans to gut the Bridgeport, renovate it, construct four additional stories, and convert it into a ten-story office building. He obtained a financial commitment from a lender on May 9, 1985, and a building permit from defendant on May 15, 1985. On July 22, 1985, defendant

notified plaintiff that his building permit had been restricted pending further review of the construction plan. Plaintiff was permitted to recommence work on the project approximately six months later. Plaintiff expended substantial sums in connection with the acquisition and renovation of the Bridgeport.

On or about March 6, 1986, plaintiff's financing for the project was discontinued. Thereafter, he was unable to find a replacement source of financing and no further construction took place. The Bridgeport remained uncompleted, and unoccupied, until its demolition in July 1992.

On May 15, 1989, defendant's Bureau of Buildings filed a complaint with a Code Hearings Officer (CHO) pursuant to the provisions of the Portland City Code ("PCC" or "the code"), PCC 24.55.250 and PCC 24.55.300. The complaint alleged that the Bridgeport was an "abandoned structure" in violation of PCC 24.15.020. That provision defines an abandoned structure as:

> a structure that has been vacant for a period in excess of six months, or any period less than six months when a vacant structure or portion thereof constitutes an attractive nuisance or hazard to the public.

The complaint also alleged that the Bridgeport was a "dangerous structure" under PCC 24.15.060. The complaint was assigned CHO Case No. 905050.

Administrative hearings were held before a CHO on June 1, 1989, October 4, 1989, November 15, 1989, March 1, 1990, and October 4, 1991. At the last of these hearings, the parties stipulated that the Bridgeport had been outfitted

with steel shutters and was, as of that date, secure. They further stipulated that the building was structurally sound and was not in danger of collapse due to structural weakness. Nevertheless, the CHO ordered the Bridgeport demolished on the grounds that it was an abandoned structure under PCC 24.15.020. The CHO's supplemental order, issued on October 4, 1991, further stated:

> The structure ... in its current partially completed and gutted condition, remains a visual blight upon the surrounding neighborhood.
>
> There is nothing in the record of this proceeding that would lead me to believe that further delay in the demolition of this structure would do anything other than inflict this ugly and potentially hazardous building on the neighborhood and the city for some additional, indefinite time.

See Order re: Stipulated Facts, Ex. D.

On or about July 27, 1992, defendant commenced demolition of the Bridgeport. The demolition was completed during 1992 and involved the complete removal of the structure from the property.

Plaintiff twice sought review of the CHO's demolition orders in Multnomah County Circuit Court, but was unsuccessful. Plaintiff acknowledges that the procedures employed by defendant provided him with adequate notice of its proposed course of action and an opportunity to be heard. Plaintiff further acknowledges that, as of the hearing on October 4, 1991, the Bridgeport was an abandoned structure under PCC 24.15.020 and was therefore subject to "abatement" by demolition under the terms of the code.

STANDARDS

Fed. R. Civ. P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Once the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Celotex,* 477 U.S. at 324.

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec.. Inc. v. Pacific Elec. Contractors Ass'n.,* 809 F.2d 626, 630 (9th Cir. 1967). Reasonable doubts about the existence of a factual issue should be resolved against the moving party. *T.W. Elec. Serv.,* 809 F.2d at 631. The court must view the inferences drawn from the facts in the light most favorable to the nonmoving party. *T.W. Elec. Serv.,* 809 F.2d at 630-31.

DISCUSSION

Plaintiff acknowledges that defendant had the authority, under its police power, to raze the Bridgeport. He contends, however, that by failing to compensate him for the loss of the building, defendant's conduct constitutes an unlawful taking of his property. In support, plaintiff argues that defendant's real motivation for the demolition of the Bridgeport was to rid the neighborhood of a visual blight. He concludes that, because defendant's actions were intended to promote community aesthetics, rather than to advance a weightier or more legitimate community interest, the demolition of the Bridgeport was not authorized by any provision of the code, nor does it pass muster under the

balancing test adopted by the Supreme Court in *Agins v. Tiburon,* 447 U.S. 255 (1980) Plaintiff also contends that, even if defendant had taken down the Bridgeport due to its status as an abandoned structure under PCC 24.15.020, the action would nevertheless constitute a taking of property under the *Agins* analysis.

Defendant argues, in opposition to plaintiff's summary judgment motion and in support of its own, that the demolition of the Bridgeport does not amount to a compensable taking because (1) it advanced legitimate state interests, (2) did not deny plaintiff all economically viable use of his property, and (3) did not represent a permanent physical invasion of his property. See *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886 (1992) (quoting *Nollan v. California Coastal Commission,* 483 U.S. 625 (1987); *Agins,* supra). In its reply memorandum, however, defendant raises the additional argument that this action must be dismissed based on plaintiff's failure to pursue available state remedies for the alleged taking of his property. As this latter argument goes to the question of subject matter jurisdiction, I must address it first.[1]

I. *The Court has subject matter jurisdiction over plaintiff's claims.*

Under Oregon law, a person deprived of property through the state's exercise of its power of eminent domain may bring an action for inverse condemnation. *See Willard v. City of Eugene,* 25 Or.App. 491 (1976). An action for inverse condemnation is authorized by Article I, Section 18 of

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[1] In view of defendant's exhaustion of remedies argument, I have construed defendant's motion as one to dismiss or, in the alternative, for summary judgment.

the Oregon State Constitution, which provides that "[p]rivate property shall not be taken for public use ... without just compensation . . .." Article XI, Section 4 of the Constitution applies a comparable restriction to the actions of municipal corporations. The prevailing party in a inverse condemnation suit is entitled by statute to recover costs and reasonable attorney fees. ORS 20.085.

Having determined that the State of Oregon provides a remedy for persons whose property is taken as a result of governmental action, I must now address whether exhaustion of that remedy is an essential prerequisite to federal jurisdiction in the present case. There is no dispute that plaintiff has not attempted to obtain compensation for the destruction of the Bridgeport in a state court action.

However, if resort to that remedy is not mandatory for the types of claims alleged by plaintiff, then this action need not be dismissed.

Defendant relies primarily on *Williamson Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), in which the Supreme Court examined the question of ripeness in the context of a taking claim. The Court found that a taking claim asserted under § 1983 was not ripe for consideration because the property owner had failed to seek compensation for his losses under a Tennessee law providing for inverse condemnation actions. It stated:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking. Thus, we have held that taking claims against the Federal Government are premature until the

> property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. "

Id. at 195 (citations omitted). Defendant also relies on *Broughton Lumber Co. v. Columbia River Gorge Comm.*, 975 F.2d 616 (9th Cir. 1992), as amended by *Broughton Lumber Co. v. Columbia River Gorge Comm.*, 1992 US App Lexis 31379 (9th Cir. 1992), in which the Ninth Circuit ruled that resort to available state remedies is a prerequisite to federal jurisdiction in a taking case.

Plaintiff acknowledges that, under *Williamson,* the exhaustion of state remedies for an alleged taking of property is required in order to satisfy the ripeness requirement of federal jurisdiction. Nevertheless, he maintains that dismissal of his claims is inappropriate because: (1) his § 1983 claim is predicated on a violation of substantive due process and, therefore, it is not a taking claim subject to the exhaustion requirement; (2) his claim for declaratory relief provides an independent basis for federal jurisdiction; and (3) his inverse condemnation claim falls within the pendent jurisdiction of this court. I agree with plaintiff's reasoning.

The *Williamson* decision makes clear that a taking claim asserted under § 1983 may be subject to the exhaustion of remedies requirement, no less than a taking claim asserted under a different legal theory. Here, however, plaintiff's § 1983 claim is distinguishable from his taking claim in that he seeks redress for a substantive due process violation, rather than for a taking of property. Plaintiff's substantive due

process claim "is that [defendant] may not demolish the Bridgeport Hotel solely because of its unoccupied status irrespective of [defendant's] motives, [defendant's] procedures or whether [defendant] pays compensation." *See* Plaintiff's Response to Defendant's June 15, 1993 Memorandum, p. 3. Recent Ninth Circuit cases support plaintiff's contention that a substantive due process claim arising from an alleged taking may be asserted in federal court without resort to available state remedies. *Sinaloa Lake Owners Ass'n. v. City of Simi Valley,* 662 F.2d 1398 (9th Cir. 1989), cert. denied, *Doody v. Sinaloa Lake Owners Ass'n.,* 494 U.S. 1016 (1990); *Bateson v. Geisse,* 657 F.2d 1300 (9th Cir. 1988). The reasoning of *Williamson,* therefore, does not apply to plaintiff's § 1983 claim.

Based on the foregoing, I conclude that plaintiff's § 1983 claim is ripe for consideration. Additionally, because plaintiff has demonstrated an appropriate basis for federal jurisdiction under § 1983, I deny defendant's motion to dismiss the inverse condemnation claim. Consideration of that claim is appropriate as an exercise of pendent jurisdiction. Defendant's motion to dismiss the declaratory judgment claim is also denied.

II. *Plaintiff has not suffered a compensable taking of property.*

Plaintiff maintains that the demolition of the Bridgeport constituted a physical occupation of his property which has prevented him from deriving any economic benefits from his ownership interest. He correctly observes that, in cases where government regulations result in a permanent physical invasion of property, the Supreme Court has held that compensation is required regardless of the extent of the intrusion or the weight of the public interests involved.

Lucas, 112 S.Ct. at 2893. He further observes that compensation is generally required where government regulations deny a property owner all "economically beneficial" use of his holdings. *Id.*

Defendant, on the other hand, maintains that the demolition of the Bridgeport represents a far lesser degree of governmental interference with property rights than that alleged by plaintiff. It therefore urges a case-specific inquiry into the extent of the intrusion occasioned by the demolition, and the public interests served by it. I agree with defendant's approach.

The destruction of the Bridgeport was authorized by defendant's Building Regulations. Those regulations did not work to deprive plaintiff of the right to exclude others from his property, nor did they compel plaintiff to suffer the ongoing presence of other persons, or the property of other persons, on his land. Instead, the effect of defendant's ordinances was to restrict plaintiff's right to maintain perpetually an abandoned structure on his property. Plaintiff has therefore suffered no permanent invasion of his ownership interest in the property. Similarly, plaintiff has not been deprived of "all economically beneficial or productive use" of his property. *Lucas,* 112 S.Ct. at 2893. The evidence establishes that plaintiff remains the owner of the lot on which the Bridgeport was situated, and that the land has economic value and is suitable for development. Therefore, this is not a case, as plaintiff maintains, where compensation must be paid as a matter of course.

In a case such as this one, the question of whether a taking has occurred "necessarily requires a weighing of private and public interests." *Agins,* 447 U.S. at 261. The Supreme Court has consistently held that "the Fifth

Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Lucas,* 112 S.Ct. at 2693-93 (quoting *Agins,* 447 U.S. at 260 (emphasis omitted)). In addition, even where a regulation does not strip property of all economic uses, "[t]he economic impact ... on the claimant and ... the extent to which the regulation has interfered with distinct investment-backed expectations" must still be considered. *Penn Central Transportation Co. v, New York City,* 436 U.S. 104, 124 (1978).

As a general matter, land-use regulations that adversely affect property interests are upheld where they promote "health, safety, morals, or general welfare ...." *Id.* at 125. In this case, I am satisfied that the razing of the Bridgeport advanced legitimate public interests. There is no question that the building remained continuously vacant, and in an incomplete and unusable condition, from the mid-1980s until its demolition in 1992. Defendant argues persuasively that unoccupied buildings may negatively impact public welfare, whether because they require a higher level of police or fire services or because they tend to inhibit commercial development in the surrounding area. There is evidence that such undesirable side-effects were associated with the Bridgeport's vacant condition. There is also no question that the continuing existence of the Bridgeport implicated significant public health and safety concerns.[2] Accordingly,

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[2] The CHO's supplemental order compelling the demolition of the Bridgeport contains no indication that the building presented a danger to the community. Indeed, the parties have stipulated that, as of October 4, 1991, the Bridgeport was secure against unauthorized intruders and was not in danger of collapse due to structural weakness. However, the CHO's orders of June 2, 1989, November 24, 1969, and March 1, 1990, contain considerable evidence that the Bridgeport was, for a considerable time, structurally unsafe. Those orders also

it was reasonable for defendant to conclude that the public interest would not be served by permitting plaintiff to keep the building on his property in its perpetually uncompleted state. See, e.g., *Shaffer v. City of Winston*, 33 Or. App. 391, 394 (1978) (City could rationally conclude that there is "a greater danger to the public from unoccupied substandard buildings than from occupied ones . . . .").

Plaintiff acknowledges that legitimate interests are served by defendant's regulation of unoccupied buildings, but contends that the negative public impact of the Bridgeport could have been curtailed through some lesser form of regulation. He suggests, for example, that defendant could have alleviated its safety concerns by providing, at plaintiff's expense, enhanced police and fire services for the building. He also states that defendant could have classified the Bridgeport as a "derelict building" under the code and, had it done so, the harsh remedy of demolition would have been avoided.[3] I am unswayed by plaintiff's arguments. As I have

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indicate that the building was a haven for vagrants and criminals and contained hazardous levels of waste and debris. The parties' stipulation that the Bridgeport was secure and structurally sound disposes of some of the CHO's safety concerns, but it by no means nullifies all of them. Although the building was not, on October 4, 1991, a candidate for demolition as a 'dangerous structure" under the code, there is good reason to conclude that the Bridgeport represented a greater threat to the community's safety and well-being than would a completed, functional building of comparable size in a similar location.

[3] PCC 24.15.065 sets forth the definition of "derelict building" and identifies the various remedial measures that must be undertaken by the building's owner. Those measures include (1) the provision of regular maintenance during the period of the building's vacancy, and (2) the submission of a plan for its reoccupancy and use, or its demolition. In this case, the CHO provided plaintiff with numerous opportunities to improve the condition of the Bridgeport and lay the

stated, the ordinance on which defendant relied, PCC 24.15.020, was properly invoked to further important societal interests. The regulatory alternatives urged by plaintiff would not have served those interests in a satisfactory manner.

Plaintiff also argues that the taking of private property by a city pursuant to its police power must be compensated where such action is intended to promote lesser public interests, such as community aesthetics. Leaving aside the accuracy of plaintiff's statement of the law, I cannot accept his contention that defendant's decision to demolish the Bridgeport was intended, first and foremost, to rid the neighborhood of an unattractive building. It is true that, in the CHO's supplemental order issued on October 4, 1991, he noted that the Bridgeport, ". . . in its current partially completed and gutted condition, remains a visual blight upon the surrounding neighborhood." However, the order expressly stated that the CHO's decision to raze the building was based on PCC 24.15.020, which provides for the "abatement" of abandoned structures. The CHO's previous administrative orders similarly focused on the Bridgeport's status as an abandoned structure as justification for the various remedial measures required of plaintiff. Therefore, although the CHO cited the Bridgeport's negative aesthetic value in explaining his decision to demolish it, there is no evidence that defendant's reliance on PCC 24.15.020 was a pretext, nor that the CHO's sole motivation was beautification of the urban landscape.

I turn now to the extent of plaintiff's loss resulting

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groundwork for its future reoccupancy. Plaintiff failed to take the necessary steps to save the building. Consequently, even if defendant could have filed its complaint against the Bridgeport under PCC 24.15.055, rather than PCC 24.15.020, it is far from clear that the demolition of the building would have been avoided .

from the demolition of the Bridgeport. As I have stated, the destruction of the building did not deprive plaintiff of all economically beneficial use of his property. Plaintiff remains the owner of the land on which the building was situated and is free to develop it. I further find that defendant's actions did not frustrate plaintiff's "distinct investment-backed expectations" concerning his property. *Penn Central Transportation Co.*, 438 U.S. at 124. Plaintiff was well aware that, under defendant's ordinances, he would not be permitted to maintain the Bridgeport on his property in its unfinished state for an indefinite period of time. Nevertheless, plaintiff failed to improve the condition of the building to comply with defendant's regulations, instead allowing it to remain as it was for several years. Because the demolition of the building was fully consistent with "existing rules and understandings" concerning the use of land within defendant's jurisdiction, plaintiff has not suffered a compensable loss. *Lucas,* 112 S.Ct. at 1901 (citations omitted).

For the foregoing reasons, I find that plaintiff has not established a basis for relief on his inverse condemnation claim, nor is he entitled to a declaration releasing him from liability for the costs of the demolition. Additionally, my determination that no taking has occurred requires the dismissal of plaintiff's § 1983 claim. The complaint is therefore dismissed.

CONCLUSION

Plaintiff's motion for partial summary judgment (#11) on his civil rights and inverse condemnation claims is DENIED as to the issue of liability. Plaintiff's motion for summary judgment on his claim for declaratory relief is also DENIED. Defendant's motion (#13) to dismiss for lack of

subject matter jurisdiction is DENIED and its alternative motion for summary judgment is GRANTED. The complaint is dismissed. Additionally, the court declines to exercise pendent jurisdiction over defendant's counterclaims for civil penalties and demolition costs and, therefore, the counterclaims are dismissed *sua sponte*.

DATED this 30 day of June 1993.

/s/ Robert C. Belloni
Robert C. Belloni
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HANS HOECK,	)	
	)	
Plaintiff,	)	Civil No. 93-98-BE
	)	
vs.	)	J U D G M E N T
	)	
CITY OF PORTLAND, a municipal corporation,	)	
	)	
	)	
Defendant.	)	
	)	

Based on the record, this case is DISMISSED.

IT IS SO ORDERED.

DATED this 6 day of July, 1993.

/s/ Robert C. Belloni
Robert C. Belloni
United States District Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

HANS HOECK,	)
	) No. 9005-02917
Petitioner,	)
	) JUDGMENT
v.	)
	) (Ex Parte)
CITY OF PORTLAND and WILLIAM SHATZER, CODE HEARINGS OFFICER,	)
	)
Respondents.	)

This matter came on for a hearing before the Honorable James R.. Ellis on petitioner's Petition for a Writ of Review. on October 16, 1990. Petitioner was represented by J. Richard Forrester, attorney at law and respondents were represented by Paul C. Elsner and Valencia R. Tolbert, Deputy City Attorneys. The Court, having reviewed the record, transcript and memoranda of the parties, and having considered their respective arguments, HEREBY ORDERS AND ADJUDGES:

1. That the petition for issuance of a writ of review is denied;

2. That the orders of the Code Hearings Officer in CHO Case No. 905050 are valid and enforceable; and

3. Respondents are the prevailing parties and they shall be entitled to recover their costs and disbursements incurred herein.

E - 2

MONEY JUDGMENT

1.JUDGMENT CREDITOR: CITY OF PORTLAND
2.JUDGMENT CREDITOR'S S ATTORNEY PAUL C. ELSNER
3. AMOUNT OF JUDGMENT: $1,049.47
4. JUDGMENT DEBTOR(S): HANS HOECK
5. PRE -JUDGMENT INTEREST: NOT APPLICABLE
6. POST-JUDGMENT INTEREST: 9% SIMPLE
7. ACCRUAL INFORMATION: 9% ON ENTIRE BALANCE

IT IS SO ORDERED AND ADJUDGED:

DATED this 26TH day of October, 1990.

/s/ James H. Ellis
James H. Ellis

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

HANS HOECK,	)
	) No. 9112-07839
Petitioner,	)
v.	) JUDGMENT
	)
CITY OF PORTLAND, a municipal corporation,	) (Ex Parte)
	)
	)
Respondent.	)

Honorable Thomas L. Moultrie on petitioner's Petition for Writ of Review. Darin Honn represented the petitioner and Valencia R. Tolbert, Deputy City Attorney, represented the respondents. The Court, having reviewed the record, transcripts and memoranda of the parties, and having considered their respective arguments, HEREBY ORDERS AND ADJUDGES:

1. That the petition for issuance of writ of review, is denied;

2. That the orders of the Code Hearings Officer (CHO) in CHO Hearing No. 905050 are valid and enforceable;

3. To obtain a stay of execution on this judgment during the appeal, the court shall require the petitioner to secure a supersedes bond in the amount of $150,000.00 and name the City of Portland as payee.

4. Respondents are the prevailing parties and they shall be entitled to recover their costs and disbursements incurred herein; and

E - 4

MONEY JUDGMENT

1. JUDGMENT CREDITOR: CITY OF PORTLAND
2. JUDGMENT CREDITOR'S ATTORNEY: VALENCIA R. TOLBERT
3. AMOUNT OF JUDGMENT: $307.88
4. JUDGMENT DEBTOR: HANS HOECK
5. PREJUDGMENT INTEREST: NOT APPLICABLE
6. POST JUDGMENT INTEREST: 9% SIMPLE
7. ACCRUAL INFORMATION: 9% ON ENTIRE BALANCE

IT IS SO ORDERED AND ADJUDGED:

Dated this 17 day of July, 1992.

/s/ Thomas L. Moultrie
Thomas L. Moultrie
District Court Judge

SUBMITTED BY:

Valencia R. Tolbert, OSB #90396
Deputy City Attorney

APPENDIX F

PORTLAND, OREGON CODE HEARINGS OFFICER

PRELIMINARY ORDER

CITY OF PORTLAND, petitioner
V.
HANS HOECK, respondent

HEARING NO.	905050
PROPERTY:	5-13 N.E. 3rd Avenue, Portland, Oregon: Lot 5 except the part in East Burnside Street, Lot 6, and the South 10 feet of Lot 7, all in Block 67, EAST PORTLAND ADDITION, City of Portland, Multnomah County, Oregon.
DATE OF HEARING:	June 1, 1989
HEARINGS OFFICER:	William W. Shatzer
APPEARANCE:	Mr. Stan Scotton for the City. Mr. Hans Hoeck, personally and by his attorney, Mr. J. Richard Forester.

FINDINGS OF FACT AND CONCLUSION OF LAW:

Pursuant to Rule 19(b), the findings of fact and conclusions of law entered orally on the record at hearing are incorporated herein by this reference.

ORDER:

1. Respondent is hereby ordered and directed to secure the subject structure against unauthorized entry, to ensured that such structure is not used as a harbor for transients, vagrants, criminals, or other unauthorized persons, and to ensure that such persons are not permitted to use, occupy; enter, congregate or harbor in the structure. Specifically, respondent is ordered and directed to undertake the following measures:

   a. Respondent shall secure all windows, doors, and other openings accessible from the exterior of the structure with at least 5/8-inch plywood or its equivalent and spaced no more than 8 inches apart.

   b. Respondent shall cause the structure to be inspected at least once a day and shall resecure any access to the structure with 24 hours in the event any of the plywood securing the structure is broken, damaged, or removed.

   c. Respondent shall provide Portland Police, East Precinct, with the names of all persons authorized by respondent to be in or about the structure. Respondent shall fully cooperate in the prosecution of any unauthorized persons discovered within the structure by Police personnel, including the signing of appropriate criminal complaints and appearing as a witness at any trial or other proceeding as requested by the Police or the prosecuting attorney.

d. Respondent shall provide to the Portland Police, East Precinct, and the City of Portland, Bureau of Buildings, a phone number or numbers of respondent and/or respondent's agent or agents. The respondent and/or his agents shall be available at one or more of those phone numbers on a 24-hour basis to respond to any discovered problems with the security of the structure. In the event Police or Bureau of Buildings personnel ascertain that unauthorized persons are entering or have entering into the structure, respondent shall, within 24 hours after telephone notification, undertake such actions, measures, repairs, or alterations as the Police or Bureau of Buildings personnel may determine is necessary and appropriate to prevent such entry.

2. Respondent is further ordered and directed to undertake the following actions to improve the safety and sanitation of the structure and reduce and ameliorate its deleterious effect on the surrounding neighborhood:

a. Not later than June 15, 1989, respondent shall remove from the interior and exterior areas of the structure all trash, debris, garbage, fecal materials, junk, and litter. To the maximum degree feasible, respondent shall sanitize the interior of the structure to remove all odor and health hazards associated with the garbage, fecal material, and urine.

b. Respondent shall remove and/or paint over, at least once a week, all signs, posters, handbills,

markings, and graffiti which may, from time to time, be affixed to or marked or painted on the exterior of the structure.

3. Respondent is further ordered and directed to obtain a standard liability insurance policy on the subject property naming the City of Portland as a named insured in the amount of at least $500.000.00 and present adequate evidence thereof to the City of Portland City Attorney's Office not later than June 21, 1989.

4. This matter is continued until October 4, 1989, unless set for sooner hearing upon the motion of either party or upon the hearings officer's own motion.

5. The hearings officer finds that the violations on this property present an immediate hazard to the health, life, and safety of the occupants of the property and to the occupants of adjacent properties, and, accordingly, this order is effective immediately.

6. This order may be appealed by writ of review to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated June 2, 1989

/s/ William W. Schatzer
Code Hearings Officer

ORDER

CITY OF PORTLAND, petitioner
V.
HANS HOECK, respondent –

HEARING NO.	905050
PROPERTY:	5-13 N.E. 3rd Avenue, Portland, Oregon: Lot 5 except the part in East Burnside Street, Lot 6, and the South 10 feet of Lot 7, all in Block 67, EAST PORTLAND ADDITION, City of Portland, Multnomah County, Oregon.
DATE OF HEARING:	October 4, 1989, and November 1, 1989
HEARINGS OFFICER:	William W. Shatzer
APPEARANCES:	Mr. John L. Duckworth for the City. Mr. Hans Hoeck, personally and by his attorney, Mr. J. Richard Forester.

The following will serve as my FINDINGS OF FACT and CONCLUSIONS OF LAW in this proceeding.

The property located at 5-13 E. Burnside Street is located within the city limits of the City of Portland and is under the ownership and control of the respondent Hoeck. The property is developed with a deteriorated concrete, multi-story commercial building. At one time, work was undertaken to

renovate and expand this building; however, all work has been stopped for some considerable time and the new portions of the structure are in a mostly unfinished condition while the old portions remain unrepaired and uninhabitable.

At the time of the original hearing in this proceeding, the structure was a dangerous and abandoned building within the provisions of Title 24 of the Code of the City of Portland, Specifically:

1. The structure had been vacant for a period in excess of six months and unoccupied except for transient illegal occupancy by vagrants, trespassers and criminals.

2. The structure was open to entry and was a harbor for vagrants, trespassers and criminals. Repeated and regular police action was required to remove unauthorized persons from the premises and to deal with criminal and other illegal activities within the structure.

3. The interior of the structure contained large amounts of trash, debris, and human waste products which presented a hazard to persons in and about the structure, including police and other emergency personnel required to enter this structure.

4. All windows had been removed from the structure which presented a fall hazard to persons within the structure, including police and other emergency personnel required to enter the structure. The absence of windows also allowed weather entry into and deterioration of the structure and allowed the entry of vagrants, criminals, and trespassers.

5. Numerous holes had been cut in the structure's floors which were open and unguarded and which presented a fall hazard to persons in the structure, including police and other emergency personnel required to enter the structure.

6. The plumbing fixtures had been removed and the drains were open creating a risk of sewer gases entering the structure from the open drains. This is both a health and fire hazard to persons in or around the structure.

7. The concrete support beams had been broken and the reinforcing steel exposed and rusted. The presents a hazard of collapse or failure under adverse conditions such as earthquake or fire.

Some of these conditions have been partially corrected as a result of the June 1, 1989 preliminary order entered in this proceeding. The large amounts of trash, debris, and human wastes have been removed from the interior of the structure and the ground floor openings have been secures. There is, however, evidence that unauthorized persons are still gaining access to the structure. The balance of the violations remain uncorrected; the structure is still vacant and uncompleted, the windows are still removed and open except for the boarded ground floor windows, the drains remain open; the unguarded, open holes still remain in the floors, and the structural deterioration of the concrete support beams and steel structure remains uncorrected. Thus, despite the measures taken by Mr. Hoeck pursuant to the preliminary order, the building remains in a dangerous and abandoned status.

In the memoranda submitted by his counsel, respondent makes

several factual and legal objections to any further proceedings or orders in this proceeding.

First, respondent argues that the original March 29, 1989 notification by the director of the Bureau of Buildings required him to "within 30 days of the date of this letter to secure the building adequately against entry by transients or to begin completion or demolition of the structure." Respondent argues that as the building is now secure, he has complied with the requirements of the CCP 24.55.250 notification and thus no further action is necessary or warranted. The short answer to this contention is that the respondent did not comply with the requirements of the notifications. At the time of June 1, 1989 hearing, over a month after the respondent was required to have taken action, the structures still open to entry, was still being used as a shelter and gathering place for numerous vagrants, criminals, and other undesirable persons, and was consuming considerable police resources to deal with the problems generated by these individuals in and around the structure. As respondent failed to comply, CCP 24.44.300 clearly authorized the Bureau of Buildings to invoke the jurisdiction of the Code Hearings Officer. Once that jurisdiction is invoked, the Hearings Officer has all the powers enumerated in CCP 22.05.010 and is not limited merely to the options contained in the original notification. In any case, the evidence at the most recent hearing demonstrated that the structure is still not secure. While unauthorized entry and criminal activities are perhaps not as flagrant as previously, these types of activities are still not in compliance with the requirements of the original notice.

Secondly, respondent argues that the structure is neither dangerous nor abandoned under the provisions of Title 24 and, accordingly there are no violations nor any basis for the

hearings officer to exercise further jurisdiction.

While it is true that respondent's actions taken pursuant to the preliminary order have alleviated some of the more serious hazards in this structure, I cannot accept respondent's contention that this structure is no longer properly categorized as a "dangerous structure" under CCP 24.15.060. For instance, the missing windows and unguarded floor openings remain. Given the location, condition and history of this structure, there is almost certain to be entry into the structure sometime in the reasonably near future, either by trespassers or by city emergency and police personnel or both. The open windows, stairwells and elevator shafts present the very real hazard of a multi-story fall with resulting serious injury or even death. Similarly, the sewer drains remain open with the resultant risk of sewer gases escaping into the structure. This remains a health hazard to persons working at or occupying nearby properties. Additionally, if sewer gas can become a highly explosive combination. The broken concrete beams and rusted steel work and reinforcing rods clearly have less strength that would be required in new construction. While perhaps not in imminent danger of collapse, it is clear that the structure is more likely to fail or collapse under-adverse conditions such as earthquake, fire, or high winds than would code-complying new construction. Clearly the collapse of a building of this size and in this location would have the most serious public safety impacts. Finally, it is evident that despite Mr. Hoeck's efforts to secure the structure, unauthorized vagrants, drug users and other undesirable are still entering and using this structure. So long as the building remains in its present condition, it will continue to be an attractive magnet for these types of persons with a resultant adverse impact upon the surrounding neighborhood and properties. The continuing deficiencies in this building present at least a very real possibility of seriously endangering

human health, life and safety and that this structure is a dangerous building under Title 24.

Respondent's argument that this structure is not an "abandoned structure" appears similarly misplaced. CCP 24.15.020 provides that an abandoned structure is any structure vacant more than six months or vacant less than six months and which constitutes a hazard to the public. The structure has, by the respondent's own admission, been vacant in excess of the statutory six month period, and, in any case, as outlined above, the structure continues to pose a hazard to the public.

Respondent's other objections if I understand them correctly, also appear insufficient. Whatever the merits of respondent's argument that the abandoned and dangerous buildings provisions are not intended to apply to construction sites, this structure is clearly not a construction site. No current building permits are applicable to this structure and no construction has occurred for several years.

State v. Freeland does not appear applicable in this proceeding. Freeland was a criminal proceeding. The principals enunciated in that case do not appear applicable to a civil administrative proceeding such as this one.

Finally, the application of the abandoned building remedies of civil penalties and/or demolition to this structure is neither arbitrary nor unreasonable. Even accepting respondent's argument that this structure is no longer dangerous (which I do not,) it is clearly objectionable as an abandoned structure. Vacant structures clearly have an adverse impact on property values and general "liveability." This particular structure, towering several stories into the air over one of the city's major thoroughfares and visible form large areas of Portland

on both sides of the river, has many times the adverse impact of the typical vacant structures. It cannot do so as long as this structure remains in its highly visible, half-finished state.

Accordingly, I find that the dangerous and abandoned building provisions of Title 24 of the City Code are applicable to this structure and the respondent Hoeck is in violation of those provisions.

I further find that Mr. Hoeck is in violation of the provisions of the June 2, 1989 order. While Mr. Hoeck was not completely remiss in undertaking the actions required by that order, it is apparent that he failed to exercise the degree of diligence required by that order. Mr. Hoeck was clearly on notice that only the highest degree of diligence, as required by the June 2 order would in effective in maintaining the security of this structure. That the required diligence was lacking is evidenced by the fact that the structure was still unsecured and being entered by vagrants and others as recently as late October. Apparently only after the city filed for further hearing in this matter did Mr. Hoeck finally initiate the daily inspections required to assure the security of the structure. For the reasons enumerated on the record, at hearing, a civil penalty is appropriate for Mr. Hoeck's failure to fully conform to the provisions of the June 2, 1989 preliminary order.

This matter has now been pending before the hearings officer for almost six months to allow Mr. Hoeck the opportunity to assemble the financing and plans necessary to complete the restoration of the structure. While some progress has been made, Mr. Hoeck is still unable to commit to any time frame for the completion of this structure. While I have some sympathy for Mr. Hoeck and his predicament, the City and its citizens cannot be required to endure the adverse effects of

Mr. Hoeck's financial difficulties while he hopes, like Mr. Miccawber, that "something will turn up." This building has been a blight to the City and a hazard to its citizens for far too long. It is time that it be either repaired or demolished in an expeditious manner.

I am continuing this matter until 10:00 a.m., February 15, 1990, for further hearing. At that time, I expect that Mr. Hoeck will present the hearings officer with a viable timetable and plan for the completion of the structure. At that hearing, Mr. Hoeck should be prepared to present the following:

1. Documentary evidence of sufficient committed financing to complete the structure.

2. Documentary evidence of an executed contract with a general contractor for the completion of the structure or, if Mr. Hoeck is to act as his own general contractor, documentary evidence of executed contracts with all necessary specialty subcontractors including steel, concrete, masonry, heating and ventilation, electrical, plumbing, and finish work.

3. A schedule of the work for completing the restoration of the structure showing the scheduled completion date of each phase of the work. The schedule should provide for work to commence no later than March 15, 1990 and to be completed and the structure approved for occupancy (except for tenant improvements on unleased space) not later than October 15, 1990.

4. Valid building, plumbing, electrical, and heating and ventilating permits from the City of Portland, Bureau of Buildings for all work necessary to complete the

structure and obtain approval for occupancy, except tenant improvements in unleased space.

Upon a satisfactory presentation by Mr. Hoeck, I will enter a final order requiring restoration of the structure in accordance with Mr. Hoeck's schedule of the work. In the absence of such satisfactory presentation I will have no alternative but to require the demolition of the building and to consider the possible imposition of substantial civil penalties.

The ORDER is as follows:

1. For the violation of the preliminary order entered herein June 2, 1989, respondent Hoeck shall pay to the City of Portland a civil penalty in the sum of $500.00, said penalty to be due and payable immediately. Respondent shall be personally liable for this penalty and, if not paid, the same shall be made a lien against the subject real property.

2. Except as expressly modified herein, the provisions of the June 2, 1989 preliminary order remain in full force on effect and the respondent is ordered and directed to comply with the terms thereof.

3. This matter is continued until 10:00 a.m., Thursday, February 15, 19909, unless set for soon hearing upon the motion of either party or the hearings officer's own motion.

4. The hearings officer retains jurisdiction in this matter.

5. This order has been mailed to the parties on November 24, 1989, and shall become final and effective on December 9, 1989. Any objections to this order must

must be in writing and received by the Code Hearings Office prior to the effective date.

6. This order may be appealed by writ of review to a court of competent jurisdiction pursuant to ORS 34.010 et seq..

Dated November 24, 1989

/s/ William W. Schatzer
Code Hearings Officer

ORDER

CITY OF PORTLAND, petitioner
V.
HANS HOECK, respondent

HEARING NO.	905050
PROPERTY:	5-13 N.E. 3rd Avenue, Portland, Oregon: Lot 5 except the part in East Burnside Street, Lot 6, and the South 10 feet of Lot 7, all in Block 67, EAST PORTLAND ADDITION, City of Portland, Multnomah County, Oregon.
DATE OF HEARING:	March 1, 1990
HEARINGS OFFICER:	William W. Shatzer
APPEARANCE:	Mr. Stan Scotton for the City. Mr. Hans Hoeck, personally

and by his attorney, Mr. J. Richard Forester.

FINDINGS OF FACT AND CONCLUSION OF LAW contained in the orders entered June 2, 1989, and November 24, 1989, are incorporated herein by reference.

ORDER:

1. Respondent is hereby ordered and directed to apply for and obtain an appropriate demolition permit for the demolition of the abandoned and deteriorated multi-story commercial building located on the above-described real property and to completely demolish the same and return the sit to a clean and level condition not later than June 1, 1990.

2. In the event respondent fails, omits, or neglects to comply with the provisions of paragraph 1 above and fails to demolish the building and have the same inspected and approved by the date indicated, a civil penalty in the sum of $100.00 per day will be imposed for each and every day after June 1, 1990, in which the respondent remains in violation, and the City of Portland is authorized and directed, pursuant to the provisions of CCP 24.55.300, to undertake the demolition of the building at respondent's sole cost and expense. Respondent shall be personally liable for the City's cost of demolition, including the City's's reasonable overhead and administrative expenses, and, if not paid, the same may be a lien against the subject real property.

3. This order has been mailed to the parties on March 2, 1990, and shall become final and effective on March

17, 1990. Any objections to this order must be in writing and received by the Code Hearings Office prior to the effective date.

4. This order may be appealed by writ of review to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Date March 1, 1990

/s/ William W. Schatzer
Code Hearings Officer

SUPPLEMENTAL ORDER

CITY OF PORTLAND, petitioner
V.
HANS HOECK, respondent

HEARING NO.	905050
PROPERTY:	5-13 N.E. 3rd Avenue, Portland, Oregon: Lot 5 except the part in East Burnside Street, Lot 6, and the South 10 feet of Lot 7, all in Block 67, EAST PORTLAND ADDITION, City of Portland, Multnomah County, Oregon.
DATE OF HEARING:	Friday, October 4, 1991
HEARINGS OFFICER:	William W. Shatzer

APPEARANCE: Mr. Gregory A. Carslon and Mr. L . John Duckworth for the City. Mr. Hans Hoeck, respondent. Mr. William R. Turnbow, Attorney at Law, for the Federal Deposit Insurance Corporation, interested party.

FINDINGS OF FACT AND CONCLUSION OF LAW:

The structure located at 5-13 N.E. 3rd Avenue remains an abandoned building in violation of the provisions of Title 24 of the Portland City Code.

The structure is not suitable for warehousing under the provisions of PCC 24.55.500. The structure does not met the Bureau of Buildings warehousing guidelines and, in its current partially completed and gutted condition, remains a visual blight upon the surrounding neighborhood.

Despite the addition of several new actors to the "cast of characters" in this long-running production, none of these new players seems willing or able to make any firm commitments undertake the completion of this structure or to provide the financing necessary to do so. The only commitments towards completing this structure come from Mr. Hoeck, and even these are full of hopes, promises, and future contingencies. Unfortunately, past experience has demonstrated that Mr. Hoeck's hopes and promises, while perhaps expressed with the best of intentions, cannot be relied upon.

There is nothing in the record of this proceeding that would lead me to believe that further delay in the demolition of this structure would do anything other than inflict this ugly and potentially hazardous building on the neighborhood and the

city for some additional, indefinite time.

ORDER:

1. The Orders entered in this proceeding March 1, 1990, and November 24, 1989, shall remain in full force and effect.

2. This order has been mailed to the parties on October 4, 1991, and shall become final and effective on October 21, 1991. Any objections to this order must be in writing and received by the Code Hearings Office prior to the effective date.

3. This order may be appealed by writ of review to a court of competent jurisdiction pursuant to ORS 34.010 et. seq.

Dated: Friday, October 4, 1991 /s/ William W. Schatzer
Code Hearings Officer

APPENDIX G

PORTLAND CITY CODE

TITLE 24 BUILDING REGULATIONS

Chapter 24.15

DEFINITIONS

. . . .

24.15.020 Abandoned Structure. An abandoned structure is a structure that has been vacant for a period in excess of 6 months or any period less than 6 months when a vacant structure or portion thereof constitutes an attractive nuisance or hazard to the public.

. . . .

Chapter 24.55

ABATEMENT OF UNSAFE, ABANDONED AND DANGEROUS BUILDINGS

24.55.100 Purpose and Scope.

(a) Purpose. The purpose of this Chapter is the protection of the health, safety, and welfare of occupants and that of the general public by providing a just equitable, and practicable method of regulating unsafe and abandoned structures and abating dangerous buildings by any of the following means:

(1) Demolition and removal pursuant to Section 24.55.250 or 24.55.300 of this Chapter.

(2) Repair and rehabilitation pursuant to Section

24.55.250 or 24.55.300 of this Chapter.

(3) Repair and rehabilitation in whole or in part, with or without public acquisition, by the City under the direction of the Council but only for such buildings that are used for low income multi-family housing that are determined by the Director to be imminently dangerous and only to the extent of the imminently dangerous condition and only with Housing and Community Development funds appropriated by the Council for the purpose pursuant to Section 24.55.400 of this Chapter.

(b) Scope. The provisions of this Chapter shall apply to all structures as herein defined, which are now in existence or which may hereafter become unsafe, abandoned, or dangerous in this City.

24.55.150 Definitions. For definitions relating to this Chapter see Section 24.15 of this Title.

24.55.200 Repair or Demolitions. All structures which are required to be repaired or demolished under the provisions of this Chapter shall be subject to the requirements of Chapters 1 and 3 of the State Building Code.

24.55.250 Enforcement. If the Director finds a structure is dangerous, unsafe, or abandoned, he may commence proceedings to cause the repair, vacation, demolition, or warehousing of the structure. In the event proceedings are commenced:

(a) The Director shall in writing, notify the owner or his agent, and the occupant, if any, of the existence of the violations. The notice shall contain:

(1) The street address and a legal description sufficient for identification of the premises upon which the building is located.

(2) A statement that the Director has found the

building to be unsafe or abandoned or dangerous, with a brief and concise description of the conditions found.

(3) A statement of the action required to be taken by the owner or his agent within a specified time period or periods as determined by the Director. Repair or demolition shall be completed within 180 days from the time of issuance of the required permits, but in no event later than 210 days after the date of notice.

(b) Service of notice. The notice and order and any amended or supplemental notice or order, shall be posted on the structure, and one copy thereof shall be served on the owner of record as indicated on the last equalized assessment of the roll of the County in which said property is located

(c) Method of service. Service of the notice and order shall be made upon all persons entitled thereto, either personally or by mailing a copy of such notice and order by registered or by certified mail, postage prepaid, return receipt requested, to each person at his address as it appears on the last equalized assessment roll of the County in which the property is located, or as known to the Director. If no address of any such person so appears, or is known to the Director, then a copy of notice and order shall be so mailed, addressed to such person, at the address of the building involved in the proceedings.

(d) Permits required. If the Director has determined that the building or structure must be repaired or demolished) the order to the owner shall require that all required permits be secured.

(e) Agreement and Contracts to Repair. The Director may enter into an agreement or contract to repair as defined in Section 24.15.030, with the owner or his appointed agent, to set priority of items to be repaired and shall include commencement and completion dates for such repair. Agreement or contracts to repair shall be in writing and may be enforced pursuant to Section 24.55.300 of this Chapter.

(f) Vacating in the event of immediate danger.

(1) Should the Director find violations to the extent that an immediate danger is posed to the health, safety, or welfare of the occupants, the owner, or that of the general public, he may order the structure to be vacated or demolished forthwith, if in his discretion he finds circumstances that do not allow time for prior application to the Hearing Officer.

(2) Upon vacation of the structure a notice shall be posted at or on each exit of the building and shall be in substantially the following form:

DO NOT ENTER
UNSAFE TO OCCUPY

It is unlawful to occupy this building
or to remove or deface this notice.

DIRECTOR
BUREAU OF BUILDINGS
CITY OF PORTLAND

(g) Compliance. Whenever such notice is posted, the Director shall include in such notice a statement reciting the emergency and specifying the conditions which necessitate the posting. No person shall remain in or enter any building which has been so posted, except that entry may be made to repair, demolish, or remove such building pursuant to a permit. No person shall remove or deface any such notice after it is posted until the required repairs, demolition, or removal have been completed and a Certificate of Occupancy issued pursuant to the provisions of the Oregon State Structural Specialty Code and Fire and Life Safety Code.

(h) Abandoned structures and vacant service station sites.

(1) Abandoned structure as defined in this Chapter

shall be abated pursuant to the provisions of Sections 24.55.250 or 24.55.300. However if the Director determines the structure suitable he may permit warehousing pursuant to Section 24.55.450 of this Chapter.

(2) Service station sites. An unused service station site is a service station site not used for a continuous period 6 months as a service station as defined in this Chapter. If such site has changed to another use without the required permits, the time spent in the new use shall be deemed non-service station site use.

(3) All vacant service station sites are hereby declared to be a public nuisance and shall be abated by removal of all above and below grade facilities by modification and use of the premises for some other occupancy, or if authorized by Title 33, used as a service station site. Such abatement shall be provided by the procedures specified in this Chapter.

24.55.300 Referral to the Hearings Officer At any time after the Director determines that a structure contains one or more violations of this Chapter and after notice to the owner as specified in Section 24.55.250, the Director may cause an action to be instituted before the Code Enforcement Hearings Officer as provided in Title 22 of this Code. In the event the owner fails or neglects to comply with any order or the Hearings Officer to repair or demolish a structure, the Hearings Officer may authorize the Bureau of Buildings to carry out such repairs or demolish the structure.

24.55.350 Appeals. (Amended by Ord. No.158042; and 158563 June 4, 1986.) All appeals from the Code Hearings Officer's determination that allows the Bureau of Buildings to repair or demolish a structure shall be by writ of review as authorized by Section 22.04.010 of the City Code and ORS 34.010 - 34.100.

Supreme Court, U.S.
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No. 95-748

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

HANS HOECK,

Petitioner,

v.

CITY OF PORTLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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January 12, 1996

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Hans Hoeck asks this Court to review the ruling of the Ninth Circuit Court of Appeals upholding the City of Portland's demolition of his derelict building. The

Court of Appeals Opinion is reported at 57 F.3d 781 (1996). The Court should deny the petition. Hoeck asks the Court to review a federal question that was not before the Ninth Circuit, that is, whether the City's actions violated the Takings Clause of the Fifth Amendment to the United States Constitution. In addition, Hoeck's petition misportrays the facts of this case.

STATEMENT OF THE CASE

In 1984, Hans Hoeck bought a vacant six-story structure commonly known as the Bridgeport Hotel on Burnside Avenue, a main thoroughfare running east and west through downtown Portland, Oregon. During 1984 and 1985, Hoeck made plans to gut the structure, add four floors, and convert it to an office building.

Hoeck received a City of Portland building permit for his project in the spring of 1985 and commenced work. Over the next three months he gutted the structure, supplemented the foundation, and added steel superstructure for an additional four floors.

In July, 1985, the City caused work on the site to be restricted after determining that Hoeck needed to obtain additional land use approvals to raise the building by four floors. Those land use approvals and revised building permits were granted in early February, 1986, so that construction could recommence.

During this same time, State Federal Savings and Loan, from which Hoeck had received a commitment for permanent financing for the renovation project, was declared

insolvent. Its operations were taken over by the Federal Savings and Loan Insurance Corporation (FSLIC) and later by the Federal Deposit Insurance Corporation (FDIC). In early March, 1986, FDIC disavowed the State Federal Savings and Loan financing commitment to Hoeck.

Hoeck tried unsuccessfully to obtain substitute financing. In the mean time, construction work on the Bridgeport project ceased and it stood uncompleted and unoccupied.[1] The appendix contains photographs of the structure taken in 1989, which were part of the administrative and judicial record below.

For three years, the Bridgeport stood vacant, half built, and open to the elements. Finally, after receiving complaints from neighbors, the City's Bureau of Buildings commenced administrative proceedings under the City Code against the structure as an abandoned and dangerous building.[2] The Buildings Bureau asked that Hoeck be required either to complete the Bridgeport Hotel structure or remove it. As

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[1] The record does not support Hoeck's suggestion that the City "caused the building to become abandoned" because it caused Hoeck's financing to fall through. Petition for Certiorari at 17. The record shows the contrary. The City did suspend Hoeck's building permit in mid-1985, when it determined that the permit had been improperly granted. But the City had granted a new, proper permit by February, 1986. Hoeck's financing was not withdrawn until March, 1986.

[2] Portland City Code provides that the City may, after notice and opportunity for hearing, order restoration or demolition of abandoned or dangerous structures. Portland City Code Chapter 24.55. Petitioner's Appendix, G-1 to G-5.

required by code, the case was assigned to a Code Hearings Officer for hearing.

The first of six administrative hearings was held in June, 1989. Mr. Hoeck was represented by counsel. Among other things, the Hearings Officer found that:

> The structure was open to entry and was a harbor for vagrants and criminals. Repeated and regular police action was required to remove unauthorized persons from the premises and to deal with criminal and other illegal activities within the structure.
>
> The interior of the structure contained large amounts of trash, debris, and human waste products which presented a hazard to persons in and about the structure, including police and other emergency personnel required to enter the structure.
>
> All windows had been removed... which presented a fall hazard to persons within the structure, including police and other emergency personnel .... The absence of windows also allowed weather entry into and deterioration of the structure and allowed the entry of vagrants, criminals, and trespassers.
>
> Numerous holes had been cut in the structure's floors which were open and unguarded and which presented a fall hazard to person in the structure, including police and other emergency personnel....
>
> The plumbing fixtures had been removed and the drains were open creating a risk of sewer gases entering from the open drains. This ...[was] both a

> health and fire hazard to persons in and around the structure.
>
> The concrete support beams had been broken and the reinforcing steel exposed and rusted. The existing steel structure of the building was rusted and deteriorated. This present[ed] a hazard of collapse or failure under adverse conditions such as earthquake or fire.

Hearings Officer's Order, November 24, 1989, Petitioner's Appendix, F-6 to F-7.[3]

The Hearings Officer found that the numerous building code and safety violations at the Bridgeport "present[ed] an immediate hazard to the health, life, and safety" of persons in and around the building. Hearings Officer's Order, June 2, 1989, Petitioner's Appendix, F-4. He directed Hoeck to take a number of steps to secure the structure from entry, to police the structure to prevent unauthorized entry, to "improve [its] safety and sanitation ... and to reduce and ameliorate its deleterious effect on the surrounding neighborhood...." *Id.*, Petitioner's Appendix, F-3.

The second hearing before the Hearings Officer occurred in November, 1989. The Officer found that although Hoeck had taken some steps consistent with the June, 1989, order, he had failed to remedy many of the violations. The Hearings Officer found that the structure "remains in a

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[3] The order from the November, 1989, hearing contains findings and conclusions covering both the June and November, 1989, hearings.

dangerous and abandoned status." Petitioner's Appendix, F-7. The Hearings Officer imposed a civil penalty against Hoeck of $500 and directed him to comply with the earlier order. He did not, however, order the building demolished. Instead, he continued the hearing again to February, 1990, to allow Hoeck time to arrange to complete the building. Petitioner's Appendix, F-12.

On March 1, 1990, another hearing was held. Mr. Hoeck was still in violation of the earlier orders and presented no plans or financing arrangements to do anything with the Bridgeport. The building stood, as it had for four years, an empty carcass, dangerous, and derelict, a haven for drug abuse and crime. The Hearings Officer affirmed his findings that the structure was abandoned and dangerous and ordered its demolition within 90 days. Hearings Officer's Order of March 1, 199O, Petitioner's Appendix, F-15.

Hoeck, as allowed by Oregon law, filed a Writ of Review in Multnomah County Circuit Court, challenging the Hearing Officer's decision. Among other things, Hoeck argued that his due process rights under the Fourteenth Amendment to the United States Constitution had been violated. *Hoeck v. City of Portland*, Multnomah County Circuit Court No. 9005-02917, First Amended Petition for Review, (July 3, 1990), ¶s 16, 17, 18, 19, 20. He did not, however, assert that the order to demolish the building constituted a "taking" under either the federal or state constitutions. The Circuit Court denied the writ and issued a judgment affirming the Hearing Officer's demolition order. The judgment was signed October 26, 1990. Petitioner's Appendix, E-1 to E-2. Hoeck did not appeal that judgment. The Bridgeport was still standing at that time, nearly 18

months after the City initiated its first administrative enforcement proceeding in 1989.

Even though Hoeck's state court case was resolved in favor of the City, he ignored the order to demolish the building. Thereupon, Portland City Council directed the City's Bureau of Buildings to hire a contractor to raze the Bridgeport. The work was to commence on May 17, 1991. On May 15, 1991, however, the Federal Deposit Insurance Corporation (FDIC) petitioned the Multnomah Circuit Court for a writ of mandamus and injunction preventing the destruction. *State ex rel Federal Deposit Insurance Corporation v. City of Portland*, Multnomah County Circuit Court No. 9105-03202. FDIC claimed that the City's action was improper because the FDIC had never received official notice of the numerous hearings involving the Bridgeport's fate. (FDIC had actual notice of the proposed demolition of the building in August, 1990, but did not seek judicial intervention until May, 1991. *State ex rel Federal Deposit Insurance Corporation v. City of Portland*, Memorandum Opinion of Judge Thomas L. Moultrie, September 3, 1991.)

The Circuit Court took FDIC's petition under advisement and demolition was delayed. In September, 1991, the Circuit Court concluded that under the City Code, FDIC should have received notice of the hearings before the Hearings Officer. The court therefore issued a writ of mandamus, enjoining demolition of the Bridgeport until FDIC was accorded an opportunity for administrative hearing. *Id.*

The City forthwith convened a sixth hearing before the Hearings Officer on October 4, 1991, at which FDIC appeared to argue its interests, represented by counsel. The

parties stipulated as follows, as stated by one of the Building Bureau officials in attendance at the hearing:

> I believe that both parties are willing to stipulate that the building remains essentially unchanged since the last hearing. That there has been no reconstruction or demolition ... with the exception that the plywood boards have been taken down and replaced with steel shutters. That, like any other securing system, they are going to require regular inspection and maintenance to keep people from breaking in, but the building is secure at this date. I think the City is also willing to stipulate that the building is structurally sound in the sense that its is not in danger of collapse due to structural weakness at this point.

Transcript of Oct. 4, 1991 Hearing, contained in City's Court of Appeals' Supplemental Excerpt of Record at 202.

FDIC asked that the building not be demolished, holding out the hope that Hoeck might yet obtain financing to complete the Bridgeport project. FDIC suggested, instead, that the Bridgeport should be "warehoused" under the appropriate City code provision that allowed warehousing of vacant structures.[4]

---

[4]Portland City Code § 24.55.500 provides as follows:

> When the Director [of the Buildings Bureau] determines that a structure is suitable, due to its historic designation or other significant features, that owner may be permitted to warehouse such structure...for a period of up to 30 months. An extension for one further period of 1 year may be

The Hearings Officer concluded that the structure did not meet the standards for warehousing vacant buildings. Noting that the building was a "visual blight" on the neighborhood, a decrepit "monolith towering several stories into the air," the Hearings Officer rejected warehousing the building because "not only are there large holes in the roof, there is no roof. There are holes in the exterior walls [and] the glazing is not intact...." Transcript of October 4, 1991 Hearing, City's Supplemental Excerpt of Record at 246. The Hearings Officer went on to reaffirm his earlier decision that the structure should be demolished. Petitioner's Appendix, F-16 to F-18.

The FDIC did not appeal that decision. Hoeck, however, sought another Writ of Review, in which he again challenged the order as violative of his due process rights and in which he again failed to suggest that the order constituted a "taking." The Multnomah County Circuit Court upheld the Hearings Officer's final order in a judgment entered July 20, 1992. Petitioner's Appendix, E-3 to E-4. Hoeck appealed that determination to the Oregon Court of Appeals. The appeal was dismissed January 8, 1993, after Hoeck had failed to file any brief with the Court of Appeals.

The Bridgeport Hotel was finally demolished by the City in the summer of 1992, more than three years after the City filed its first complaint against the structure. Petitioner's Appendix, C-4. Hoeck filed his action against the City in

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permitted by the Director, provided that the condition of the warehoused structure is determined by inspection to be satisfactory.

federal district court on January 26, 1993.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court should reject the petition because Hoeck seeks review of a Fifth Amendment issue that was not before the Ninth Circuit and is not, therefore, properly before this Court.

Hoeck asks this Court to review the legality of the City's demolition of the Bridgeport Hotel under the Takings Clause of the Fifth Amendment to the United States Constitution.[5] Although his petition is divided into several subsections, he argues in each only that the City's action constituted a taking for which compensation must be paid. But Hoeck did not present the Ninth Circuit with a Fifth Amendment claim.[6]

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[5] Although Hoeck's version of the Questions Presented is opaque, the text of his Petition focuses exclusively on the Fifth Amendment taking issue. In each separate argument for the grant of certiorari, Hoeck refers repeatedly to "takings," "compensation," or the "Takings Clause of the Fifth Amendment." See Petition at pages 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27.

[6] Hoeck's complaint alleged a deprivation of civil rights under 42 USC § 1983. His first claim for relief alleged that the City's dangerous and abandoned building ordinance was applied to Hoeck "in violation of Hoeck's rights under the Fifth and Fourteenth Amendments of the United States Constitution" because it allowed the "uncompensated demolition" of Hoeck's building. As his third claim for relief Hoeck also alleged that the City's action constituted inverse

For this reason, the Ninth Circuit did not render a Fifth Amendment decision this Court can review.[7]

Hoeck does not, in fact, contend that the Ninth Circuit had a Fifth Amendment claim before it. To the contrary, he admits, as he must, that the Ninth Circuit's inverse condemnation "decision ... [was] made under Article I, section 18 of the Oregon constitution...." Petition for Certiorari at 13. Having made this admission, however,

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condemnation for which compensation was due, but he cited no federal or state constitutional provisions in support of that claim.

In its motion for summary judgment against Hoeck's suit, the City argued, to begin with, that the district court should not assert jurisdiction over what appeared to be a Fifth Amendment taking claim in Hoeck's complaint. The district court had no jurisdiction over that claim under this Court's ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requiring exhaustion of state inverse condemnation remedies prior to seeking federal relief under the Fifth Amendment. Faced with the City's motion, Hoeck conceded the point. *Hoeck said that his complaint did not raise a Fifth Amendment claim* and asked the court to treat his federal civil rights claim as one alleging, instead, a violation of the Fourteenth Amendment's substantive due process protections. See discussion by district court, Petitioner's Appendix, C-7 to C-9.

[7] The federal question dealt with by the Ninth Circuit opinion was based on the doctrine of "substantive due process." The Ninth Circuit's substantive due process decision was unremarkable. The Court of Appeals applied a legal standard fully consistent with this Court's decisions and those of other Circuit courts. See, Ninth Circuit opinion citing *Albright v. Oliver*, ____ U.S. ____; 114 S.Ct. 804; 127 L.Ed.2d 14 (1994); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Petitioner's Appendix, A-13 to A-15.

Hoeck then seeks to bootstrap his way past the jurisdictional hurdles to raising a federal Fifth Amendment claim at this late date. According to Hoeck, since the Ninth Circuit cited federal Fifth Amendment cases in construing the Oregon constitution, he should be able now to transform a case about Oregon law into a federal constitutional case. Petition for Certiorari at 13.

Hoeck's petition simply does not present a justiciable federal question. This Court should not grant certiorari merely to issue an advisory opinion on how lower courts should use its Fifth Amendment jurisprudence when interpreting state constitutions.

II. Even if there were a Fifth Amendment takings issue in this case, the facts of this case do not present the issue as Hoeck frames it.

Even if there were a Fifth Amendment takings issue in this case, it would not be the one Hoeck tries to present. Hoeck tells the Court that the issue is whether a municipality can demolish a private building without compensation because it "is merely unsightly or unoccupied."

As the more complete statement of the case contained in this brief in opposition reveals, however, the facts of this case do not present the question Hoeck poses. The City of Portland demolished Mr. Hoeck's Bridgeport Hotel only after it had stood vacate and open to the elements for six years, after a Hearings Officer had repeatedly found that it was a safety hazard, after Hoeck had violated City orders to secure and renovate the building, after the City repeatedly delayed the building's demolition to allow Mr. Hoeck time to complete work on the structure, and after Oregon courts

twice reviewed and upheld the City's orders.

Finally, before the last of six administrative hearings granted Hoeck over a three year period, Hoeck secured the building's carcass with steel shutters so that it no longer constituted an immediate threat to public safety. The City Hearings Officer at that point ordered the demolition of the building as an "abandoned structure." The demolition occurred ten months later.

Despite Mr. Hoeck's suggestion to the contrary, this case does not present the issue of whether governments have the power to demolish private buildings solely for aesthetic reasons. This is not a case about an ugly building. This is a case about a property owner's six-year refusal to comply with municipal codes properly designed to protect the health, safety and welfare of the community.

CONCLUSION

For the foregoing reasons, the City of Portland urges the Court to deny Hans Hoeck's petition for certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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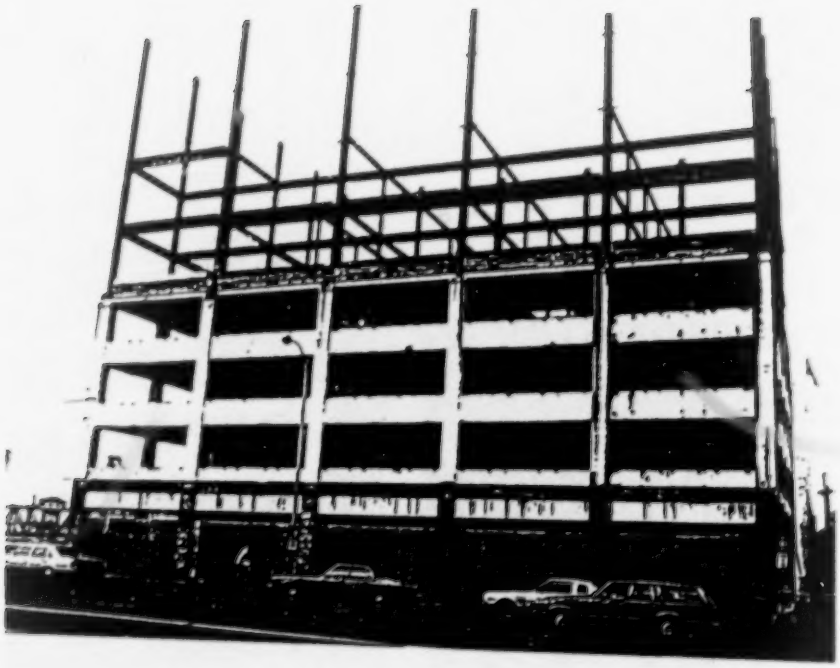
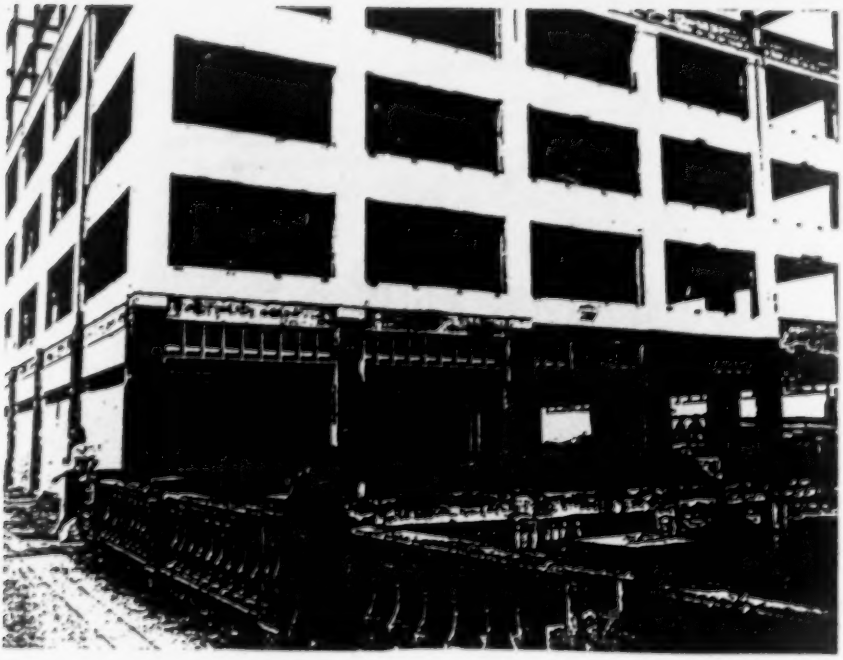
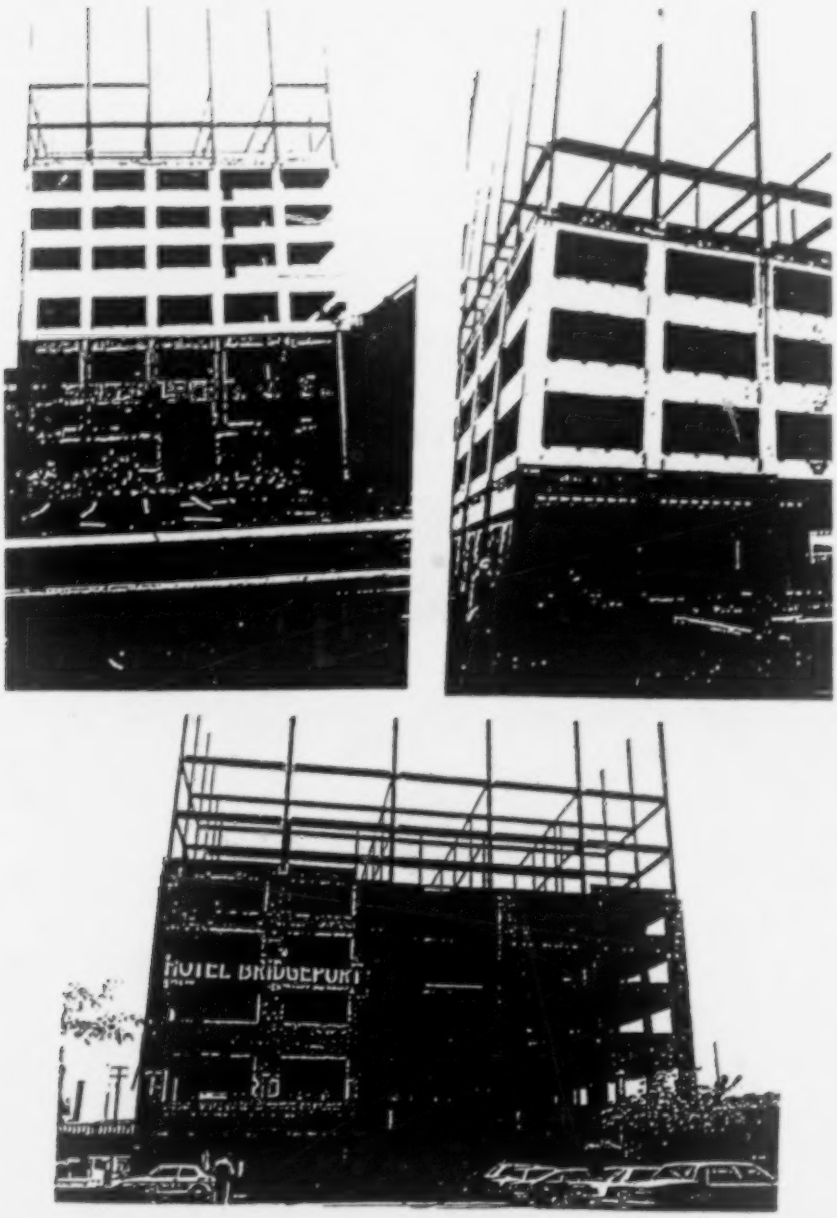
January 12, 1996

APPENDIX






HOTEL BRIDGEPORT

REPLY

BRIEF

Supreme Court, U.S.
FILED
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No. 95-748

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On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

The City of Portland, in its opposing brief in No. ~~94~~ 95-748, contends this Court may not review the decision of the Court of Appeals for the Ninth Circuit to determine if the city's demolition of the Bridgeport Hotel was an unconstitutional taking of Mr. Hoeck's private property without just compensation under the Fifth and Fourteenth Amendments to the United States Constitution. It bases that contention on the assertion that Mr. Hoeck's Federal takings claim was neither raised nor decided below. The city also contends that this Court should not review the Ninth Circuit's decision because the hotel was demolished, not because it was merely unsightly, but because it was found in violation of city codes intended to protect the health, safety and welfare of

the city. Both contentions misstate the facts in the record and misconstrue the applicable law.

1. The Federal takings claim was raised at every level below, but did not become ripe for decision until the Ninth Circuit affirmed the grant of Summary Judgment by the District Court.

The city argues: "The Court should reject the petition because Hoeck seeks review of a Fifth Amendment issue that was not before the Ninth Circuit and is not, therefore, properly before this Court." Brief in Opp. at 10. The city's argument misconstrues the record below, and disregards the fact that the city conceded to the Ninth Circuit that Mr. Hoeck consistently had asserted, and was continuing to assert, a Federal takings claim. Contrary to the city's assertions in its brief in opposition, the record of the proceedings below shows that the Federal takings issue was raised and decided in the District Court, and was raised and decided again in the Ninth Circuit.

At oral argument, the Ninth Circuit panel was concerned that the District Court lacked jurisdiction over Mr. Hoeck's state takings claim, brought pendent to his substantive due process claim asserted under the Fourteenth Amendment. In response to a question by the court, counsel for the city stated: "[T]he tenor of this case and the way plaintiff has prosecuted it, has always been on the takings issue; both the state law takings claim and the federal takings claim." Transcript at 13, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995). Having asserted to the Ninth Circuit that Mr. Hoeck was asserting a Federal takings claim, the city cannot now argue that claim was not before the Ninth Circuit.

At the trial court, Mr. Hoeck raised a Federal takings claim. When Mr. Hoeck moved for Partial Summary Judgment in the District Court, he stated, as a basis for his motion, that "the City's actions constitute a taking of Hoeck's private property for public use without compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States . . .." Excerpts of Record, CR 11 at 5, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995). The city, when it moved for summary judgment in the District Court, asserted that "The City's demolition of the Bridgeport did not constitute a "taking" of Hoeck's property under the United States . . . Constitution[s]." Defendant's Memorandum in Support of Motion for Summary Judgement at 10, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995) (citing, *inter alia, Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), *Kaiser Aetna v. United States*, 444 U.S 164 (1979)).

When the District Court rendered its decision on Mr. Hoeck's pendent state takings claim, it also made a decision that construed and applied the Fifth Amendment:[1] "[P]laintiff has not been deprived of 'all economically beneficial or productive use' of his property." *Id.* at App. C-10 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. ____, 112 S.Ct. 2886, 2893 (1992)). "I further find that defendant's

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[1] The District Court, in making a state constitutional decision, referred to *Shaffer v. City of Winston*, 33 Or. App. 391, 394, 576 P.2d 823 (1978), and concluded "it was reasonable for defendant to conclude that the public interest would not be served by permitting plaintiff to keep the building on his property in its perpetually uncompleted state." Pet. for Cert., App. C-12.

actions did not frustrate plaintiff's 'distinct investment-backed expectations' concerning his property." *Id.* at App. C-12 (citing *Penn Central*, 438 U.S. at 124).

Thus, under no circumstances can it be said that the District Court did not make a decision under the Fifth Amendment, as interpreted by this Court's Fifth Amendment jurisprudence. It concluded there was no taking under the Fifth Amendment, and also concluded the city's demolition did not violate Article I, section 18 of the Oregon Constitution, and thus was not a state taking.

The Federal takings claim was preserved before the Ninth Circuit. When Mr. Hoeck filed his brief with the Ninth Circuit, he again argued that the city's demolition violated the Fifth Amendment: "The City's Demolition of the Bridgeport Hotel constitutes a taking of property for which compensation is due [under] [t]he Takings Clause of the Fifth Amendment . . .." Brief for Appellant at 10, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995). The city again responded directly to this argument: "The City's demolition of the Bridgeport did not constitute a "taking" of Hoeck's property under the United States . . . Constitution[s]." Brief of Appellee at 11, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995).

Like the District Court, the Ninth Circuit based its conclusions on both state takings law and Fifth Amendment jurisprudence. The court first concluded that "The demolition of the Bridgeport Hotel was not a physical taking for public use." Pet. for Cert., App. A-17 (citing *inter alia Yee v. Escondido*, 503 U.S. 519 (1992), *Lucas*, *supra*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419

(1982), *Kaiser Aetna*, *supra*, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), and *Bowditch v. Boston*, 101 U.S. 16 (1880))[2].

The Ninth Circuit then relied on state court decisions to conclude that Mr. Hoeck had not suffered a regulatory taking under the Oregon Constitution. Critical to that determination, however, was the court's conclusion that "the regulation has not interfered with Hoeck's reasonable, investment-backed expectations. Under the law at the time Hoeck took title, he had no right to use his property as an abandoned structure." Pet. for Cert., App. A-20 (citing, *inter alia*, *Lucas*, *supra*). Thus, the Ninth Circuit made a decision on both the state and Federal takings claims.

Mr. Hoeck preserved that Federal takings claim when he petitioned the Ninth Circuit for reconsideration and suggested a rehearing en banc. "The panel's construction of Article I, section 18 of the Oregon Constitution . . ., to find no taking of Mr. Hoeck's property by the city, was inconsistent with the U.S. Supreme Court's construction of the Fifth Amendment's Takings Clause." Petition for Rehearing with Suggestion for Rehearing En Banc at 3, *Hoeck v. City of Portland*, 57 F.3d 781 (9th Cir. 1995).[3]

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[2] The Court, in making this holding, also relied on one state case, *Hawkins v. City of LaGrande*, 315 Or. 56, 843 P.2d 400 (1992) (physical occupation by flooding). It appears, at least for purposes of determining whether the city's demolition of the Hotel was a permanent physical occupation, the court assumed that decisions under both the state and Federal constitutions were identical.

[3] The rejection of this argument by the Ninth Circuit is similar to the rejection of the argument of the appellant by the California Court of Appeal in *First*

The city's argument also misapprehends the fundamental principle of ripeness of Federal takings claims set down by this Court in *Williamson Co. Regional Planning v. Hamilton Bank*, 473 U.S. 172 (1985). Mr. Hoeck's Federal takings claim, even though raised to both the District Court and the Ninth Circuit, did not become ripe until the Ninth Circuit had affirmed the District Court's denial of just compensation sought in Mr. Hoeck pendent state constitutional takings claim. In *Hamilton Bank,* Justice Blackmun, writing for the Court's majority, held that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation . . .." *Id.* at 196. Thus, it was only when the Ninth Circuit upheld the District Court's denial of Mr. Hoeck's takings claim under the Oregon Constitution that his Federal claim became ripe for adjudication.

2. The city demolished the Bridgeport Hotel because it was unsightly and unoccupied, and not because it had ever

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English Evan. Luth. Ch. v. Los Angeles Cty., 482 U.S. 304 (1987). As in the instant case, when the *First English* appellant sought review in this Court, the appellee argued "that appellant has failed to preserve for review any claim under federal law." The appellant had contended that this Court's Fifth Amendment decisions showed the state's constitutional law was in violation of the Federal Constitution. This Court concluded:

> The Court of Appeal, by applying the state rule . . . to dismiss appellant's action, rejected on the merits the claim that the [state] rule violated the United States Constitution. This disposition makes irrelevant for our purposes any deficiencies in the complaint as to federal issues.

482 U.S. at 313 n.8 (construing jurisdiction under 28 U.S.C. § 1257).

been determined to be a private, common-law nuisance.

The city argues that "This is a case about a property owner's six-year refusal to comply with municipal codes properly designed to protect the health, safety and welfare of the community." Brief in Opp. at 13. The city's underlying contention appears to be that the Hotel was a health and safety hazard at the time it was demolished. The city's Statement of the Case in its Brief in Opposition purports to support that contention. However, that assertion, and its supporting factual statements, misstates the record in this case.

The city disregards the fact that, on the very day that demolition of the Hotel commenced, the Circuit Court of the State of Oregon for Multnomah County, found that "there was nothing [about the Hotel] in the nature of a public nuisance. . . . There was nothing . . . that counsel pointed out to the Court that indicated that there was any finding that the property was now a danger or health danger or structural danger of collapse that endangered anyone . . .." *Hoeck v. Board of County Commissioners*, No. A9201 - 00164, slip op. at 15 (Multnomah County Cir. Ct., July 27, 1992).[4]

Thus the city cannot now contend that, at the time of demolition, the Bridgeport Hotel was a private, common-law nuisance. Mr. Hoeck had corrected every health and safety

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[4] This conclusion was rendered by Circuit Judge Roth after he had granted Mr. Hoeck an additional 120 days to redeem the County's tax lien on the Hotel. The city proceeded with demolition of the Hotel notwithstanding Judge Roth's order granting the additional time for redemption. *See* Pet. for Cert. at 5 n.2. Judge Roth, after stating he believed the city to be "in contempt of court," rhetorically asked the city attorney "What value is there for redemption if the property is destroyed?" *Hoeck v. Board of County Commissioners*, slip op. at 14.

violation identified by the city, and the city indeed agreed that he had done that. Brief in Opp. at 8. Instead, the city demolished the structure because it was "abandoned," which the city defines as a "structure that has been vacant for a period in excess of 6 months." P.C.C. 24.15.020 (reproduced in Pet. for Cert., App. G-1). The city contends that Mr. Hoeck's failure was to comply with ordinances adopted "to protect the health, safety and welfare of the community," Brief in Opp. at 13.

What the city really means is that it believes it is constitutionally permissible for it to demolish any building that has been vacant more than six months, merely because the building developer has been unable to obtain financing within a time schedule set arbitrarily by city officials.[5] In the end, it appears that Mr. Hoeck's failure to obtain the requisite financing when the city believed he should have was the basis for the city concluding the Hotel was "abandoned."[6]

Nor can the city conclude that it was acting under the "police power" to abate an imminent threat to the public

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[5] *See* Pet. for Cert., App. F-12 (city's Code Hearings Officer gives Mr. Hoeck from November 24, 1989 until February 10, 1990, to provide "Documentary evidence of sufficient committed financing to complete the structure."). The city also contends it did not proximately cause Mr. Hoeck to lose his financing in the first place. Brief in Opp. at 3 n.1. The city's contention overlooks the fact that Mr. Hoeck's lender, State Federal Savings and Loan, was declared insolvent by the F.S.L.I.C. after the city had suspended Mr. Hoeck's permits and before the city reissued permits to him on February 3, 1986. Excerpts of Record, CR 1 at 5, *Hoeck v. City of Portland*, 57 F.3rd 781 (9th Cir. 1995).

[6] The city's demand that Mr. Hoeck obtain and document alternative financing in an arbitrarily short time-frame, when obtaining financing had become burdensome, placed him at a disadvantage with respect to other developers with ready access to institutional financing.

health and safety. As the city notes, there were "six administrative hearings granted Hoeck over a three year period." *Id.* The city also catalogs the repeated efforts made by Mr. Hoeck to make the interim repairs to the structure to prevent it from being a health and safety hazard. *Id.* at 5-6. Over that three year period, Mr. Hoeck's efforts were successful. The city concedes that, at the end of that period, the Bridgeport Hotel "no longer constituted a threat to public safety." *Id.* Nonetheless, the city demolished the structure.

The city faults Mr. Hoeck for framing the issue in this case as whether it could demolish a building without compensation because it "'is merely unsightly or unoccupied.'" Brief in Opp. at 12 (quoting Pet. for Cert. at ii). However, in its Statement of the Case, the city sets forth that the demolition decision was upheld on the basis of the building being "'a visual blight' on the neighborhood, [and] a decrepit 'monolith towering several stories into the air . . . .'" *Id.* at 9 (citing Pet. for Cert., App. F-16 - F-18).

"This is not a case about an ugly building." Brief in Opp. at 13. Instead, and in spite of the city's Statement of the Case, this is a case about whether a building may be demolished without just compensation when the building has not been shown to be a heath or safety hazard - a private, common-law nuisance. The city, in its opposing brief, quotes from the record that, on October 4, 1991, just months prior to demolition, the city's Hearings Officer found that Mr. Hoeck had installed steel shutters and that "'the building is secure at this date." He added that he thought "the City is also willing to stipulate that the building is structurally sound. . . .'" Brief in Opp. at 8 (citation omitted).

The city, by its own representations, makes clear that the demolition of Mr. Hoeck's building was not necessitated by any emergency of the sort recognized by this Court in *Bowditch*, *supra* (destruction of houses in path of fire) or *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of trees to prevent spread of disease). It further acknowledges that the building was not a health or safety hazard at the time of demolition. Petitioner respectfully urges this Court to reject the city's argument that the uncompensated demolition of Mr. Hoeck's building is permissible merely because the city has an "abandoned" building ordinance "designed to protect the health, safety and welfare of the community." Brief in Opp. at 13.

3. Conclusion.

Based on the foregoing, the Petitioner respectfully requests that this Court grant the Petition for Certiorari, vacate the decision of the Ninth Circuit, and remand the matter back to the United States District Court for the District of Oregon.

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Respectfully submitted,

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